TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 349. 78.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

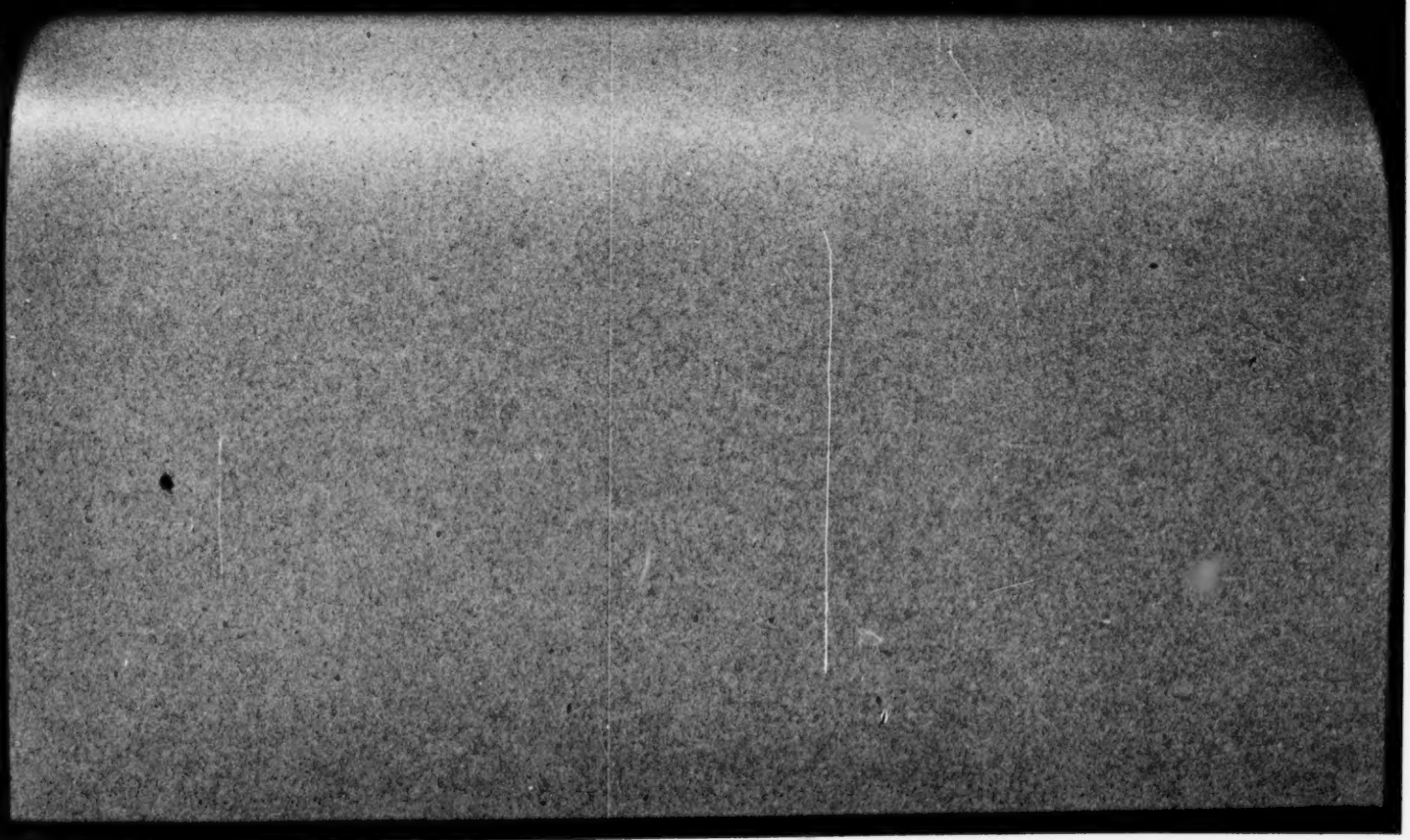
vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED JUNE 2, 1899.

(17,433.)



(17,433.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1899.

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1 *Caption of Minutes.*

May Term, 1899, First Day of May, 1899.

Be it remembered that a regular term of the United States circuit court for the southern district of Mississippi was begun and held at the court-room thereof, in the city of Jackson, on the first Monday of May, A. D. 1899, being the time and place for holding said court appointed by law.

There were present: Honorable H. C. Niles, judge; A. M. Lea, U. S. attorney; A. C. Melchior, ass't U. S. att'y; F. W. Collins, marshal; L. R. Moseley, clerk.

2 *Original Bill.*

The Bill of Complaint of—

THE ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation and Citizen of the State of Illinois, Complainant,

versus

WIRT ADAMS, Revenue Agent of the State of Mississippi, a Citizen of said State and Resident of said Judicial District, with His Office Therein; and The Railroad Commission of the State of Mississippi, the Office of which is Located in the City of Jackson, in said District; and J. J. Evans, Chairman and Member of said Commission, and M. M. Evans and John D. McInnis, Members of said Commission, Being All of the Members of said Body and All of Whom are Citizens of said State and Residents in said Southern District; and against Thomas C. Kimbrough, Clerk of said Commission, a Citizen of said State, Whose Office and Person are in said District; and against The Yazoo and Mississippi Valley Railroad Company, a Corporation of the said State Alone, Whose Principal Place of Business is in said District, Defendants.

To the honorable the judges of the circuit court of the United States presiding in and for the southern district of the State of Mississippi, at Jackson:

I.

Your orator, The Illinois Central Railroad Company, complainant aforesaid, complains and shows that it is a corporation duly organized and existing under the laws of the State of Illinois alone, and that it is domiciled, and has its chief office in the said State of Illinois, and its citizenship there, and has no corporate existence, residence or citizenship under the laws, nor in the State of Mississippi,
3 that it is a tax-payer of the State and district aforesaid, and of the county of Hinds, and of the city of Jackson therein.

Your orator further complains and shows that all of the defendants above named are citizens and residents of the State of Missis-

sippi, and of this judicial district, to wit: The defendant, The Mississippi Railroad Commission organized under the laws of the State of Mississippi, and has its office in fact and as fixed by law in Jackson, Hinds county, Mississippi, and is composed alone of the defendants, J. J. Evans, chairman, a resident and citizen in Hinds county, in said State and district, and the two defendants, M. M. Evans and John D. McInnis, both of whom are citizens of said State and of this judicial district and circuit; and the defendant, Wirt Adams, revenue agent of the State of Mississippi, and the defendant, Thomas C. Kimbrough, clerk of said commission, is also each a citizen of said State, and the former is a resident of, and the latter is personally in, said district and circuit, and each of them has his official office as such revenue agent and as such clerk, respectively, at Jackson aforesaid; and the said Yazoo and Mississippi Valley Railroad Company is a corporation of the State of Mississippi alone, and has its principal place of business and its domicile in said district.

III.

Your orator further complains and shows that the State of Mississippi was by appropriate proceedings to that end admitted into the Union as one of the States thereof in the year 1817, with its geographical limits as at present constituted. But at the time of its admission, its entire area consisted of unceded territory, except the extreme southern portion thereof, including, roughly stated, the counties of Warren and Claiborne and that territory lying south of the northern boundary lines of Jefferson, Lawrence, Covington, Jones and Wayne counties. That by the treaty of Doak's Stand, ratified January 8, 1821, the territory within the limits of said State opened by surrender of the Indian occupants thereof to white occupants, was extended northward so far as to embrace, roughly speaking, the counties of Washington, Holmes, Madison, Rankin, Smith, Jasper and Clarke, and all others lying to the south of them. Thus, until the year 1831, it remained the case that fully the entire northern half of said State remained subject to the occupancy and temporary dominion of the Indian tribes. By the treaty of Dancing Rabbit creek, which was ratified February 24, 1831, the Choctaw tribe of Indians surrendered their remaining territory in said State, which act of surrender expanded the area accessible to white
4 occupancy unto the diagonal line which is seen by reference to any standard map of the State of Mississippi, extending from Helena, Arkansas, to the northwestern corner of Oktibbeha county, and thence easterly to the Alabama line. And by the treaty of Pontotoc, ratified March 1, 1833, the remaining portion of said State, commonly known to this day as the Chickasaw cession, was surrendered to the whites by the Chickasaw tribe of Indians.

Thus it was, that in the years of 1820, 1831 and 1833 respectively, there were three distinct advancements of the ceded area whereby the domain of the State was thrown open to white settlement and possession; and it was not until the year 1835, that as a matter of fact the whole domain of the State was practically opened for that purpose.

IV.

Your orator further complains and shows that the class of people by which the original Mississippi territory was settled, such settlements being located along the Mississippi river in what is now Wilkinson, Adams and Warren counties, was one of comparative wealth and a high order of intelligence, with an amount of culture and views of public policy in advance of the ordinary class of pioneer population. From this fact it resulted that from the organization of this State are found frequent traces in its history of efforts to advance the two great causes of public education and also the work of internal development and improvement.

So early as the year 1829, an act was passed by the legislature of said State providing for the organization of a board of internal improvements, whereby the navigation of its rivers might be improved and also canals and roads be constructed; and so early as the year 1831, the legislature of this State did incorporate two companies known as the West Feliciana railroad and the Vicksburg and Clinton railroad, both of which railroads were in fact soon thereafter constructed, being amongst the earliest constructed in the United States.

The withdrawal of the Indian tribes from the territory in the State of Mississippi, as stated above, opened a vast and fertile territory to the people of this State, and the newly invented and applied art of railroad construction offered the immediate means for taking possession of and developing the same. It needs but a slight investigation of the legislative history of that period in order to see how the two facts acted and reacted each upon the other. Immediately that the possibilities of the expansion and development of the State's territory arising therefrom dawned upon the legislative mind, there was conceived and put into execution as a settled policy for internal improvement of this State, the invitation to private individuals to invest largely of their means in the construction and the operation of railroads, and such invitation consisted of the granting of charters containing attractive and valuable privileges and franchises. One of the earliest contrivances of the legislature for this purpose (and one that was persisted in for many years thereafter), was the granting in such charters of exemptions from taxation for a period of time more or less restricted.

For examples of this fact, it will be found that on the 5th day of February, 1836, when the Choctaw territory of said State had been actually opened for occupancy not more than two years, and the Chickasaw cession not one year, was granted a charter to the Jackson & Brandon Railroad and Bridge Company, section 18 of which conceded an exemption of all of the shares, and the real and personal estate appertaining to the said company for a period of five years from the completion of the railroad and bridge therein contemplated. So, also, by an act of the same legislature of 1836, approved February 27th, was incorporated the Aberdeen & Pontotoc Railroad & Banking Company, the route of such proposed railroad lying in the Chickasaw cession, whereby its capital stock was exempt

from taxation for one year after the said company should go into operation, and after that time, the taxes that might be imposed upon it were restricted forever to the sum of twenty-five cents per share of one hundred dollars. Also, by the act approved February 26th, the same year, was incorporated the Mississippi Railroad Company, by section 26 whereof all of its stock and property was exempt from taxation for the term of five years from the completion of said road, and it was further provided that the said company should not be taxed beyond the rate of taxes imposed upon real estate in the State, estimated upon the original cost for the execution and completion of the proposed works. There were other similar statutes enacted during the same year.

So also by the act of April 28, 1837, was incorporated the Northern Bank of Mississippi, which was required to build a railroad from Holly Springs to the Mississippi river, and section 6 of its charter exempted its stock from taxation for one year after such bank should go into operation, and after that it limited the taxes upon the same to twenty-five cents per share of one hundred dollars. By the act of May 11, 1837, was incorporated the Pontotoc, Oxford & Delta railroad, section 7 of its charter exempting its stock for six years, and after that imposing the same limit of twenty five cents per share of one hundred dollars.

The policy thus inaugurated and adopted as the settled policy from the inception of the railroad industry, in this State, was continuously preserved in, as stated above, for many years thereafter.

The Mobile & Ohio Railroad Company was chartered by an act approved February 14, 1848, and by section 3 thereof it was granted an exemption from taxation on its property in this State until the net earnings thereof should enable the payment of a dividend of eight per cent. per annum upon the cost of construction within this State, and said charter provision and exemption is in force and effect in this State to this date.

By the act of February 19, 1850, incorporating the New Orleans & Jackson Railroad Company, and by the other act of March 11, 1852, granting the right of way through the State of Mississippi to the New Orleans, Jackson & Great Northern Railroad Company, the said railroad was by this State granted an exemption from taxation for a period of fifteen years, and by the act of February 27, 1854, amendatory of the charter of the Mississippi Central Railroad Company, the said company was granted an exemption from taxation until the said road should be completed.

So also, after the cessation of hostilities of the late civil war, the legislature of the State of Mississippi, so soon as it had opportunity after the process of repairing the disorganization of social and industrial conditions consequent upon that great catastrophe, turned anew its attention to the upbuilding of the internal improvements, and to the further development of the territory of this State; and in so doing, it resumed and continued the policy inaugurated from the beginning, and especially from the year 1836, as stated above, in respect to matters of railroad construction. For example: By the act approved October 22, 1866, amending the charter of the

Grand Gulf & Port Gibson Railroad Company, and section 4 thereof, the capital stock of said company and all other property belonging to or connected with said railroad, was exempted from all taxation until eight years after the said road should be rebuilt and put in running order. The same legislature in the month of February, 1867, granted similar exemptions with circumstantial variances to the New Orleans, Mobile & Chattanooga, to the Grenada & Prentiss Railroad Company, and to the Grenada & Meridian Railroad Company, all of which exemptions will be found set forth in the charters of said companies respectively, in the Session Laws of 1867.

7 Then came the period of reconstruction consequent upon the civil war, during which period there was no further session of any legislature in the State of Mississippi until after the rehabilitation of the State by the adoption of the reconstruction constitution of 1869. In that constitution occurs section 13 of article XII, which is in words and figures as follows:

"SECTION 13. The property of all corporations, for pecuniary profits, shall be subject to taxation, the same as that of individuals."

And also occurred section 20 of the same article, which is in words and figures as follows:

"SECTION 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

The insertion into the new constitution of the two provisions aforesaid created a doubt in the minds of the members of the bar and of the legislature and of the judiciary as to the exact extent of the limitation thereby imposed upon the power of the legislature to grant exemptions from taxation to corporations for pecuniary profits, including railroads, because of which doubt the legislature of 1870 saw fit in the incorporation of such railroads as by it were incorporated, and in the extension of relief and aid to certain railroads already incorporated, to give to that relief and aid so extended a different shape and form from that of a simple exemption from taxation as theretofore had been done.

By an act approved July 20th, 1870, the said legislature incorporated the Mobile & Northwestern Railroad Company, and section 21 of the charter thereof was in words and figures following, to wit:

"SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon

lands or otherwise, to be used in constructing said road, or pay-
8 ing debts incurred by said company in constructing the same;
and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State, and municipal, to which said company shall be subject: Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

By another act, approved August 8th, 1870, the same legislature amended the charters of the following railroads so as to confer upon each of said companies all the rights, privileges, immunities and franchises granted by the act of incorporation of the Mobile and Northwestern Railroad Company, embraced in the twenty-first section thereof aforesaid, to wit: the Memphis and Vicksburg; the Vicksburg, Yazoo and Grenada; the Canton and Vicksburg; the Natchez and Jackson; the Meridian and Red River; the Ship Island, Mississippi City and Paducah; the Elyton and Aberdeen; the Grenada, Louisville and Meridian; and the Greenville and Rolling Fork—nine separate railroads theretofore chartered. In short, the legislature at its first session under the constitution of 1869 continued the previous policy of the State, modifying the same so as to conform to the constitution, providing a way by which, and for the considerations named, the railroads' charters should grant special and peculiar privileges in respect to the payment of all taxes for many years, said privileges being put in the form of an appropriation, made by the legislature out of its public treasury, equal in amount to what would be the amount of the taxes assessed against each respective company, and authorizing the same to be paid by the said railroad companies, as paymaster of the State, to the creditors of said railroad companies respectively, holding construction debts, the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State and by the State paid in extinguishment of the railroads' construction liabilities.

So, also the legislature of Mississippi, at its successive ses-
9 sions in 1871, 1872, 1873, 1874, 1875, 1876, 1877 and 1878 enacted many other acts similar to the foregoing, and many other acts granting simple exemptions to railroads and other corporations for pecuniary profits, which were duly approved by the chief executive, the governor, and duly published in the session acts of said State, in which the State, for the considerations therein set out, made charter contracts which protected such corporations from

the payment of all taxes for a limited time; and amongst other acts, showing the policy of said State and the practical construction placed by the legislative department of said State upon the constitution of 1869 in this regard, there was approved on April 1, 1872, an act as follows:

"An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.

"SECTION 1. Be it enacted by the legislature of the State of Mississippi, That in consideration of the construction of factories and the introduction of machinery for the purpose of erecting, furnishing and carrying on factories in this State, for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials, and for the making of all kinds of machinery and implements of husbandry necessary for the cultivation of the soil, and to manufacture all other articles or things or whatsoever character or description not inconsistent with the laws and constitution of this State or of the United States, and of the great benefit which the State will receive in the development of its manufacturing resources by means of said factories, and the large and increased amounts of machinery and capital, that will, by this liberal-spirited policy, be invited to the State, thus giving employment to and supplying the wants of the thousands of our people, and also the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less than ten thousand dollars paid in, not in operation before the passage of the act, that all taxes to which the said company or companies shall be subject for the period of ten years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories, or the purchase of machinery, or paying debts incurred by any of said companies in constructing or purchasing the same; and it shall be the duty of the tax collectors in every county, in each and every year, for the period of ten years, to give to each of said companies a receipt in full for the amount of all said taxes due, upon receiving from each of said companies an affidavit, made by the president or treasurer of each of said companies, that the amount of said taxes have actually, and in good faith, been paid and applied by each of said companies during the year in payment of debts incurred, or money borrowed, as aforesaid; and which receipt, so given, shall be in full of all taxes, county, State or municipal, to which said companies shall be subject; provided, that whatever the profits of any of said companies shall enable it to declare and pay to its stockholders an annual dividend of four per cent. upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease towards such company or companies declaring said dividends, and said taxes shall be paid by such companies declaring such

dividends to the tax collector, to be paid by him over as required by law; provided further, that nothing in this act contained shall be so construed as to exempt the property of any manufacturing or mechanical company from any tax levied by any county, city or town to meet the principal or interest on bonds issued by such county, city or town to aid in the construction of railroads; and the taxes thus levied and collected shall be applied to the payment of such bonds and interest thereon.

"SECT. 2. Be it further enacted, That this act shall take effect and be in force from and after its passage." See Session Acts of 1872, page 65.

And on the 17th day of April, 1873, and also in 1877, said State passed acts, amending the act approved April 1, 1872, aforesaid, and in the amendatory act of 1877, provided that said act of 1872, should "be so amended as not to exempt from taxation, State, county or municipal, any property of any manufactory or manufacturing company, other than that paid in capital stock of said companies, their machinery for manufacturing purposes, their manufactured goods and the buildings in which their machinery is located, and the grounds upon which their buildings are situated, or which may be within the necessary inclosure around such buildings," and so forth.

After the passage of said last named amendatory act, the Mississippi mills, a manufacturing corporation to which the privilege of the foregoing act had been extended by an amendment of its charter, filed its bill in the courts of said State, claiming that the last amendatory act aforesaid, and the things about to be done under it, impaired the obligation of its charter contract, and prayed
11 that the tax collector and his successors be enjoined from collecting the taxes and commissions allowed by the aforesaid amendatory act of 1877, and that they be compelled to execute the aforesaid acts of 1871 and 1873.

The supreme court of said State, after full argument by the most learned counsel, construed the words of the constitution of 1869, as to taxation and exemption therefrom, and declared in written opinions therein delivered, the meaning of the words of the constitution of 1869, and thus made certain and fixed the rule and interpretation of said constitution, to wit: that the words of section 13, article XII of said constitution aforesaid, did not require any legislature to tax the property of corporations for pecuniary profits, and that the words "shall be subject to," did not mean subjected to; or, in other words, that said "provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable—to be taxed, if the legislature so will;" and this express adjudication of the highest court of said State your orator shows has been followed and reaffirmed in many cases since its delivery in April, 1878, by many other rulings, opinions and decrees of the supreme court of said State, and has for twenty years been the settled law and rule of property of the said State, and has been adopted and acted upon by the legislature, the executive and the judicial departments of said

State, and by the agents and officers of the said State, and the counties and municipalities therein, and under said settled law and rule of property, and upon the faith thereof, enormous sums of money have been invested in said State, which otherwise would not have been so invested, and particularly the investments made by your orator, as hereinafter mentioned, and that many contracts, such as charter contracts with the State and other contracts between individuals or corporations, have been executed and acted upon, and the status of the parties changed so that they cannot now be restored, upon the faith of such settled law and rule of property, among which are certain contracts hereinafter mentioned.

V.

Your orator further complains and shows that in each of the revised codes of the State of Mississippi, as well as in the session acts of every legislature, many kinds of property were exempted from taxation, for varying periods, and, among others, the following:

"All permanent factories hereinafter established in this State before the first of January, 1900, for working cotton, jute, ramie, wool, silk, furs, metal and all other manufacturing imple-
12 ments or articles for use in a finished state, shall be exempt from taxation for a period of ten years." Code 1892, sec. 3744.

Also, exemptions of all railroads from taxation "where the same are in process of construction," and so forth. Acts 1884, chap. 22, and Acts 1890, chap. 2.

And in the acts requiring railroad companies to file schedules of their property with the railroad commissioners, who were authorized to assess the same for taxation, where the law provided for it, it was expressly provided that, "if any of said property is claimed to be exempt from taxation, it shall be separately stated and the law cited under which the exemption is made," and said commission was to assess for taxation such property owned as was liable for taxation under the then existing laws; indeed, in the constitution of the State of Mississippi adopted in 1890, which is still in force, among the many drastic and stringent new regulations of railroad corporations, it is expressly provided, by section 181 thereof, that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the general laws, unless sooner repealed by the legislature."

VI.

Your orator shows that under the settled law, so constructed and acted upon, as aforesaid, the successive legislatures always, including those of 1886, 1888, 1890, 1894 and 1896, as your orator is informed, refused to repeal exemptions granted as aforesaid, in charters; and at the last session of the legislature of said State, held during

the present year of 1898, although the governor in his message urged it to pass a statute repealing an exemption granted in a railroad charter in 1882, and although a bill for that purpose was introduced and urged upon it, yet the legislature steadfastly refused to pass such bill into a law, and defeated said measure so introduced.

VII.

Complaining further, your orator now shows that the legislature of the State of Mississippi, by an act entitled, "An act to incorporate the Natchez & Jackson Railroad Company," approved July 21, 1870, did incorporate the railroad company of that name with authority to build a line of railroad from Natchez, to Jackson, in the State of Mississippi; the charter of said railroad company being subsequently amended so as to change the name thereof to the Natchez,
13 Jackson & Columbus Railroad Company, with authority to extend its line from Jackson in a northeasterly direction to the city of Columbus, in said State. The said Natchez & Jackson Railroad Company, as stated above, was one of those companies to which, by the act of August 8, 1870, the privilege of the twenty-first section of the Mobile & Northwestern Railroad Company was extended, such extension being made to said company by the said State legislature prior to the acceptance by the said company of its charter and any organization thereunder. The said company accepted its charter so amended, and organized thereunder and entered upon the construction of the railroad therein provided for. The construction of said railroad was not begun until several years after its charter. Your orator is not exactly informed whether any work had been done upon the same prior to the decision of the Mississippi Mills case by the supreme court of this State stated above. But your orator does state it to be a fact, that it was not until January, 1879, nearly a full year after the decision of the Mississippi Mills case, that the said railroad was finished from the city of Natchez to the village of Martin, forty-three miles in the direction of Jackson; it was not until September, 1881, that it was extended from Martin to Miles, about fifteen miles nearer to the said city of Jackson, and it was not until October, 1882, four years and a half after the decision of said Mississippi Mills case, that the said railroad was constructed and put into operation to the city of Jackson. In the construction of said railroad, the said company issued capital stock to the par value of fifty dollars per share, aggregating $2,028,000, and also issued first-mortgage six per cent. gold bonds, payable in thirty years from date, to the sum of $1,250,000. And said railroad was constructed and equipped by the issuance and sale of said first-mortgage bonds, and by the sale of certain bonds subscribed by the city of Natchez and the county of Adams and the county of Hinds for stock of said road, and by the incurrence of a certain floating debt, with the details of which your orator is not precisely acquainted, said liability being contracted in conformity with and as contemplated by the charter of said company, and by section 21 of the said Mobile & Northwestern charter, incorporated into the charter of said company as aforesaid, and without the incurrence

of said liabilities and the expenditure of said moneys the said railroad could not have been constructed at all. And said railroad company constructed its said railroad and incurred said liability on the faith of and relying upon said section 21, incorporated into its said charter as aforesaid, as a material and valuable element of its said charter and privileges, and upon the decision in the Mississippi Mills case aforesaid, by which the supreme court of this State announced and declared the meaning of the constitution of 1869, and the status and value of such charter provision thereunder.

VIII.

Your orator further shows that at the time when the legislature of 1870 was in session, and the legislation aforesaid was had, the financial and industrial conditions of the State of Mississippi were in exceedingly low condition—in fact in a condition which seemed quite desperate. The State had been impoverished to an extraordinary degree by the result of the civil war. The values of lands had materially depreciated and the process of recovery, financially and industrially, had been exceedingly slow, and the outlook for the future was quite unpromising. The entire railroad system of the State consisted of the few railroads which had been constructed before the war. They were as follows:

1. The Mississippi & Tennessee, which ran from Memphis to Grenada.

2. The Mississippi Central, which ran from Jackson, Tenn., to Canton, Miss.

3. The New Orleans, Jackson & Great Northern, which ran from Canton, Miss., to New Orleans, La.

4. The Mobile & Ohio, which ran from Jackson, Tenn., to Mobile, Ala.

5. The Memphis & Charleston, which ran from Memphis to Chattanooga, Tenn., about thirty miles in this State.

6. The Vicksburg & Meridian, which ran from Vicksburg to Meridian in this State.

7. The West Feliciana, which ran from Woodville, in Wilkinson county, to Bayou Sara, in Louisiana, about eight miles in this State.

These few railroads, separated by great distances, were entirely inadequate to the development of the State, and there was urgent need for the building of more, and the enterprise from Jackson to Natchez, aforesaid, was the first which was practically undertaken after the war, except the Mobile & Northwestern, itself a narrow-gauge road thirty-one miles long in Coahoma county, and except the Ship Island, Ripley & Kentucky railroad, a narrow-gauge railroad in Tippah county, Miss., twenty-five miles long—both of which were incorporated by the same legislature and with the same privileges.

The said Natchez & Jackson railroad being at that time, even when constructed, only a narrow-gauge road extending from Natchez to Jackson as aforesaid, and having no through traffic connection

with great traffic lines, was at a great disadvantage and could not keep pace in traffic arrangements and facilities with the general progress of railroad developments in the United States, in consequence of which fact, it did not prosper financially. Your orator is informed and believes and states that its earnings were not sufficient to enable it to pay its operating expenses and fixed charges, and that it was not able to pay anything whatever in the shape of dividends to its stockholders.

In the year 1882, the legislature of the State of Mississippi passed an act entitled, "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and the Ship Island Railroad Companies to effect a consolidation," which said act was amended in March, 1884, by an act entitled, "An act to amend an act entitled, 'An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and the Ship Island Railroad Companies to effect a consolidation,' approved March 3rd, 1882." The aforesaid act of 1882 had incorporated in it, as section 5 thereof, the aforesaid section 21 of the Mobile & Northwestern Railroad charter. Under and by virtue of this legislation, a certain railroad company was constituted and organized in the year 1884, by the consolidation of the said Memphis & Vicksburg Railroad Company with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company (which also had been incorporated by the legislature of Mississippi in the year 1882), with a Louisiana railroad company, and also a Tennessee railroad company, the object of such consolidating railroad company being the construction of a through line of railroad from the city of Memphis, in the State of Tennessee, to the city of New Orleans, in the State of Louisiana, by way of Vicksburg, in the State of Mississippi. The said railroad was speedily constructed by the aforesaid constituent companies and by the consolidated company, in the years 1882, 1883 and 1884, so that through connection between the working gangs of the said railroads was made, and the first through train ran thereon about the first of December, 1884.

IX.

Your orator further complains and shows, that because of the unsatisfactory condition of the said Natchez & Jackson Railroad Company, and its enterprise, as stated above, in the year 1890,
16 the legislature of the State of Mississippi, passed the act entitled, "An act to authorize the Natchez, Jackson & Columbus Railroad Company to sell its railroad situated in this State, or to consolidate the same." Said act of the legislature was in words and figures, as follows:

"An act to authorize the Natchez, Jackson & Columbus Railroad Company to sell its railroad, situated in this State, or to consolidate the same."

"SECTION 1. Be it enacted by the legislature of the State of Mississippi, That the Natchez, Jackson & Columbus Railroad Company, incorporated on the 21st day of July, 1870, under the laws of this State,

be and it is hereby authorized and empowered to sell absolutely all or any part of its railroad and other property, lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities unto the said Natchez, Jackson & Columbus Railroad Company appertaining and belonging.

"SEC. 2. That the Louisville, New Orleans & Texas Railway Company and the Natchez, Jackson & Columbus Railroad Company are hereby authorized to consolidate with each other, under the name of the Louisville, New Orleans & Texas Railway Company, and upon such terms as may be agreed upon by said companies.

"SEC. 3. That this act take effect and be in force from and after its passage."

Approved February 19, 1890.

Complainant now states that the aforesaid act was introduced in the legislature by the Hon. William T. Martin who was president of the said railroad company and also a member of the senate and was passed by the legislature at his instance and request made in behalf of the said railroad company.

When such act of the legislature was passed not only had the case of the Mississippi mills been decided, as above stated, but also that case had been by the supreme court of Mississippi expressly followed, or its principle applied without express citation, in the subsequent and later cases of McCulloch *vs.* Stone, 64 Miss., decided at the October term, 1886; in Railroad Company *vs.* Thomas, 65 Miss., decided at the October term, 1888; in Bank *vs.* Worrall, 67 Miss., decided at the October term, 1889.

So that, by four consecutive decisions the said supreme court had fully and finally settled the doctrine that legislation by the State legislature, even where the same exempted property of railroad companies from taxation, was valid and binding until some other and subsequent legislature should see proper in the
17 exercise of its legislative authority to repeal such exemption and to revoke such grant.

In the case aforesaid of McCulloch *v.* Stone, the very paragraph, number 21, of the Mobile & Northwestern charter which had been imported by the act of 1882 into the charter of the Louisville, New Orleans & Texas Railway Company, was under consideration, and the supreme court, while deciding that the privilege therein conferred did not attach to outlying lands owned by said company, yet also did expressly declare that it did attach to such property of the company as was "necessary to the construction, equipment, maintenance and operation of its road."

Also, at the time of the passage by the legislature of said act of 1890, the said Natchez, Jackson & Columbus Railroad Company had been for many years, in fact, from the time when the construction of its road was commenced, in 1878 or before, up to that day (a period of at least twelve years) in the actual enjoyment, openly and notoriously, of the said privilege so conferred by its charter. The legislature of the State of Mississippi, in passing said act of 1890,

was well aware both of the adjudications of the supreme court of this State upon the validity of said section and also of the long-continued and then existing actual enjoyment of such privilege and immunity by the said railroad company. And complainant states that in the passage of said act, whereby the said Natchez, Jackson & Columbus Railroad Company was authorized to convey to any purchaser, not only its railroad and other property, but also "all franchises, rights, powers, privileges and immunities" pertaining to said company, the said legislature did intend that such sale should convey to the purchaser of said road the privilege and immunity of said section 21, aforesaid.

Complainant further states that under and pursuant to said act of 1890, and relying upon the same, and relying upon said section 21, and its privileges and immunity, as part of the charter of the Natchez, Jackson & Columbus Railroad Company, and relying upon the decision of the supreme court of the said State in the Mississippi Mills case, and the McCulloch case and other cases named above, and relying upon the fact that such privilege and immunity had been openly and notoriously enjoyed under its charter and said decisions by said Natchez, Jackson & Columbus Railroad Company for a period of full twelve years without cavil or question, and upon the further fact that in the legislatures of 1886 and 1888, as stated above, efforts had been made to repeal this privilege, with others of the same character, which the legislature had refused to do—the said Louisville, New Orleans & Texas Railroad Company, in good faith and without any notice of the claim now propounded
18 for taxes against said railroad and property, did pay therefor an enormous value, to wit: it did pay to the said Natchez, Jackson & Columbus Railroad Company for its equity of redemption in said property, the sum of $180,000 in cash, and undertook to provide for the payment of the said outstanding first-mortgage bonds and of the interest thereon subsequent to the coupons of March 1, 1890. And further, the said Louisville, New Orleans & Texas Railway Company, pursuant to its said agreement, did purchase the said $1,250,000 of outstanding bonds of the said Natchez, Jackson & Columbus Railroad Company, paying therefore $800,000 of its own first-mortgage four per cent. gold bonds, which constituted a mortgage on its entire line of railroad from Memphis to New Orleans as aforesaid (as by its charter the said Louisville, New Orleans & Texas Railway Company had a right to do), which bonds so delivered by it were payable to bearer in the city of New York and were negotiable instruments and are now outstanding in the hands of *bona fide* purchases for value without notice, freed of any equities or defenses which might be set up thereto by the said Louisville, New Orleans & Texas Railway Company, or its successors. A copy of the conveyance by the said Natchez, Jackson & Columbus Railroad Company to the said Louisville, New Orleans & Texas Railway Company of said railroad property is herewith filed, marked Exhibit "A," and prayed to be taken as a part of this bill.

X.

Your orator further complains and shows that said charter of the Natchez, Jackson & Columbus Railroad Company, including the privilege of said section 21 aforesaid, and the right to transfer the same to said Louisville, New Orleans & Texas Railway Company; and the actual transfer made as aforesaid, which included the said privileges and immunities as aforesaid, were contracts which the respective parties thereto had a right to make at the time they were made and entered into, in view of the settled law as declared to them by the supreme court of said State at the time when such agreements were formed; and, moreover, that such contracts were made by express permission of the State of Mississippi, given in and by said act of 1890, as aforesaid; and that said contracts so made were valid under the constitution and laws of the State of Mississippi, as such constitution and laws had been previously expounded, as aforesaid, and that the obligation of said contract, including that of said privilege and immunity of section 21, were at the time made, and have ever since continued to be, and now are, binding upon the said State, and that no subsequent change of decision by the judicial tribunals of said State can invalidate such contract, nor
19 impair its obligation; nor can any subsequent change in the decision as to the constitutional power of the legislature to enact said act of incorporation and grant said exemption, change or impair the rights of the parties under said charter contract, which was as aforesaid, valid when made.

Further, your orator states that notwithstanding the fact that in various of the decisions made by the supreme court of the State of Mississippi, the said privilege of section 21 has been denominated as "exemption" from taxation, the railroad companies interested in that question have never accepted that view, and your orator does not admit it, but, on the contrary, denies that the same was an "exemption" within the purview of section 13, article XII of the constitution of 1869. On the contrary, your orator charges that the same was not an exemption in that sense at all, but that the privilege of said section is exactly what it purports to be. It is a contract of appropriation as aforesaid, whereby the legislature authorized a special and peculiar mode of paying taxes, and a special and peculiar method of granting aid to the construction of said railroads; which is entirely other and different from an exemption, and is not and never was within the prohibition of section 13, article XII, aforesaid. The same is and was a contract within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract. The difference between the two views in regard to said privilege has not heretofore been material, for the reason that the legislature of this State has never proceeded upon the idea that it had the right to repeal the same under and by virtue of the constitution of 1869, but has always refused so to do, and so long as they did so refuse, it mattered nothing to the companies interested, whether the privilege was called the one thing or the other by the courts. And your orator protests and says that

the right conferred by said action on said railroad companies was and is a contract, as your orator claims and asserts that it was, which the legislature itself could not repeal, still less could it be abrogated and set aside by a change of the judicial decisions of this State.

Neither, on the other hand, if such privilege be regarded as an exemption, and within the operation of the constitution of 1869, could the courts of this State, by a change in their decisions, do that which the constitution reserved to the legislature alone—that is to say, subvert and take away such privilege regarding the same as an exemption only, and yet such action by the courts has been undertaken, and is by the proceedings herein sought to be enjoined, about to be carried out in the manner which will hereinafter be set forth.

XI.

Your orator states further that the decisions above set forth affirming the right of the legislature to enact such laws as section 21 of the Mobile & Northwestern charter, even granting the same to be "exemptions" within the purview of the constitution of 1869, were further followed at the October term, 1890, by the two cases of The Railway Company *vs.* Taylor and Attala County *vs.* Kelly, reported in 68 Miss. Reports. In the Taylor case, the idential section was again under consideration as part of the charter of the said Louisville, New Orleans & Texas Railway Company, and the said supreme court again upheld the same and gave the said company the benefit of it.

Furthermore, your orator shows that on the 1st day of November, 1890, the people of the State of Mississippi, in delegate convention assembled, adopted and promulgated a new constitution which superseded the constitution of 1869. That new constitution contained in it a chapter on the subject of "corporations" which had not appeared in any previous constitution of said State, and in that chapter were introduced many new and drastic measures in respect to corporations, their creation, rights, powers and liabilities. Yet, nevertheless, in section 181 of said constitution, which section was the outcome and continuance of section 13, article XII of the constitution of 1869, and the opening sentence of which was as follows: "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals"—there was a special reservation of the then existing rights to exemptions previously conferred. The section contains this language: "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature." And section 279 of said constitution was as follows:

"All rights, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation, shall continue," etc.

Your orator states that the said Hon. William T. Martin, president of said Natchez, Jackson & Columbus Railroad Company, and formerly State senator of 1890, and the author of the law of 1890 aforesaid, was a member of said constitutional convention and participated in the making of that constitution, and your orator states that the said convention was well aware of the existing decisions of the supreme court of said State upon the questions hereinbefore set forth, and of the sale of 1890 of the Natchez, Jackson & Columbus railroad, with its immunities and privileges to the Louisville, New Orleans & Texas Railway Company aforesaid, and of the statute of 1890
21 aforesaid, giving consent of the State thereto, and of the uniform recognition by all of the officials, executive and legislative, as well as judicial, of the State up to that time of the validity of this privilege and others of similar character, and of the continued enjoyment of such privilege and immunity of the said Natchez, Jackson & Columbus Railroad Company from the year 1878 until the date of the promulgation of said constitution; and the said convention did thereby intend to preserve and continue the said privilege and immunity amongst others of similar character then existing in this State.

The said Taylor case, mentioned above, was decided in the month of March, 1891, about four months after the promulgation of said constitution, and in and by the adjudication of the court in said case, speaking of the said section 21 as a part of the charter of the Louisville, New Orleans & Texas Railway Company, the said supreme court declared that it was and had been a privilege to which said company was legally entitled, and virtually adjudged that it was such a privilege as the constitution intended to continue. By inevitable consequence, the same thing must have been true, and it was by necessary implication, adjudged in respect to the same section 21 as a part of the charter of the Natchez, Jackson & Columbus Railroad Company, transferred as aforesaid on the date aforesaid and under the act of the legislature aforesaid to the said Louisville, New Orleans & Texas Railway Company in 1890.

XII.

Your orator now complains and shows further that in the year 1872, the legislature of the State of Mississippi incorporated a business corporation under the name and style of the Mississippi Valley Company, with its domicile and place of business in McComb city, in said State.

In or about the year 1876, your orator had acquired for value all of the stock of the Mississippi Valley Company except four shares thereof and continued to hold the same and does hold the same until this date.

In the month of April, 1892, the said Mississippi Valley Company did purchase of the said Louisville, New Orleans & Texas Railway Company 37,539 shares out of the total amount of 48,242 shares, paying therefor large value, and at the same time your orator did purchase of the first-mortgage four per cent. gold bonds of the said Louisville, New Orleans & Texas Railway Com-

pany the sum of $13,805,000 with the interest coupons thereunto attached, and of the second-mortgage bonds of said company the sum of $8,731,000 with the coupons thereunto attached, and of the income bonds of said company, the sum of $8,347,000 with
22 the interest coupons thereunto attached paying for the same large value, and the said Mississippi Valley Company and your orator each and both made such purchase relying upon the legislation all as aforesaid, and upon the said judicial decisions of said State of Mississippi all as aforesaid, and on the faith thereof, and relying upon the sale made as aforesaid of the property and railroad and immunities and franchises as aforesaid, by the sanction and permission especially given of the legislature of said State from the said Natchez, Jackson & Columbus Railroad Company to the said Louisville, New Orleans & Texas Railway Company as aforesaid. And your orator further shows that the said $1,250,000 of mortgage bonds of the said Natchez, Jackson & Columbus Railroad Company, which the said Louisville, New Orleans & Texas Railway Company had acquired as aforesaid had not been extinguished and canceled, but had been, pursuant to its contract and agreement, by the said Louisville, New Orleans & Texas Railroad Company, placed in trust as collateral security for the payment of the coupons and principal of the entire issue of the first-mortgage bonds and of the second-mortgage bonds of the said Louisville, New Orleans & Texas Railway Company, including those purchased as aforesaid by your orator. This method was adopted so that, without taking the trouble and expense of executing a new mortgage upon the property and immunities acquired from the said Natchez, Jackson & Columbus Railroad Company, and without the disarrangement of interests which such new mortgage, if executed, might have caused, the property so acquired including such franchises and such immunities, should be practically covered by and included within the first and second mortgages of the said Louisville, New Orleans & Texas Railway Company, $800,000 of its first-mortgage bonds having been by said railway company paid out in the acquisition of said property as aforesaid. Whereby in the purchase of said thirteen million of first-mortgage bonds, as aforesaid, and of said eight million of second-mortgage bonds, as aforesaid, your orator acquired as part of its security a lien upon the property, including the franchises and immunities and privileges aforesaid of the Natchez, Jackson & Columbus railroad.

A copy of the collateral trust mortgage of date November 1, 1890, from the Financial Improvement Company to the Union Trust Company of New York, as trustee, whereby such collateral trust was created, is filed with this bill, marked Exhibit B, and prayed to be taken as part hereof.

XIII.

Further complaining your orator shows that the purchase of bonds hereinbefore set forth as first, second and third mort-
23 gages of the said Louisville, New Orleans & Texas Railway Company, and the purchase of the stock hereinbefore set

forth of the said Louisville, New Orleans & Texas Railway Company, made by the Mississippi Valley Company, were paid for by your orator, in four per cent. gold bonds of your orator, payable in 1953, to the amount of $20,000,000, which said bonds were made payable to bearer in the city of New York, and are negotiable and have been delivered and transferred to *bona fide* purchasers for value, without notice, freed from all equities and defenses.

In order to secure the payment of such bonds so issued by your orator, and also an additional amount of similar bonds, sufficient to make the total issue the sum of $25,000,000, your orator did, relying upon the adjudications and legislation aforesaid, and the said constitutional provisions, and said action of the legislature in refusing in any way to prejudice or repeal the said privilege of section 21, as the same appertained both to the property that was of the Louisville, New Orleans and Texas, and had been of the Natchez, Jackson & Columbus Company, executed its certain indenture, dated the first of September, 1892, whereby it placed in the hands of the United States Trust Company, of New York city, a corporation created under the laws of New York, all of the first, second and third mortgage bonds of the said Louisville, New Orleans & Texas Railway Company, purchased by it, as aforesaid, (including their collaterals, to wit, the said first-mortgage bonds of the Natchez, Jackson & Columbus Railroad Company) representing a par value of over $34,000,000, as collateral security for the payment of its said issue of $25,000,000.

XIV.

Further complaining, your orator states that on the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company, and the Yazoo & Mississippi Valley Railroad Company (a company which had been incorporated by the legislature of the State of Mississippi in the year 1882) pursuant to authorities conferred upon them by their respective charters, effected a consolidation whereby the existence of the Louisville, New Orleans & Texas Railway Company was merged into that of the Yazoo & Mississippi Valley Railroad Company, and all of the property, real and personal, and all of the rights, franchises, privileges and immunities of the said Louisville, New Orleans & Texas Railway Company were transferred to and became the property, rights, privileges, franchises and immunities of the said Yazoo & Mississippi Valley Railroad Company. Such consolidation was effected by the said two companies in the light of and on the faith of the previous adju-
24 dications and legislative and constitutional enactments hereinbefore stated; and as a material part of the contract of consolidation between the said two companies, and considered and held in view, was the fact that by such consolidation the special privilege and immunity of section 21 of the Mobile & Northwestern charter, as applied to the taxes to be assessed against the property of the original Louisville, New Orleans & Texas Railway Company, and as well the property by it acquired from the Natchez, Jackson and Columbus Railroad Company, should pass to and be enjoyed

by the said Yazoo & Mississippi Valley Railroad Company. A copy of said articles of consolidation is herewith filed marked "Exhibit C," and is prayed to be taken as part of this bill.

After such consolidation was effected the supreme court of the State of Mississippi, in the case of Railroad *vs.* Lambert, reported in 70 Mississippi, again passed upon said section 21, and passed upon said section as being a part of the charter of the Natchez, Jackson & Columbus Railroad Company as passed to the said Louisville, New Orleans & Texas Railroad Company by the sale of 1890, and also as passed to the said Yazoo & Mississippi Valley Railroad Company by the consolidation of 1892. The said supreme court in said case reaffirmed the doctrine of the case of Mississippi mills aforesaid, and held that the said privilege of section 21 was valid and lawful and effectual, and did inure to the benefit of the Louisville, New Orleans & Texas Railroad Company as to the property that had been the property of the Natchez, Jackson & Columbus Railroad Company, by the purchase of 1890; and further, that the said privilege did also inure as to the same property to the Yazoo & Mississippi Valley Railroad Company by virtue of the consolidation of October, 1892, as aforesaid; and after the said decision was made, your orator, relying upon the said decision and the previous decisions hereinbefore stated, and upon the legislative and constitutional provisions hereinbefore set forth, and upon the refusal of the legislature, as aforesaid, to interfere by the repeal or attempted repeal of such section 21, did issue and pay out many more of its said bonds of 1892 described in the preceding paragraph of this bill, for the payment of obligations and the indebtedness of the said Louisville, New Orleans & Texas Railway Company, and for protecting, repairing, completing, improving, and extending the railroad and branches owned by the said Louisville, New Orleans & Texas Railway Company, and acquired by the said Yazoo & Mississippi Valley Railroad Company through such consolidation, and in providing elevators and docks for use in connection therewith, and in providing such work and structures, rolling stock and other equipment as would enable the said railroad that had been the property of the Louisville, New Orleans & Texas Railway Company, including the railroad from Natchez to Jackson acquired by the purchase of 1890, as aforesaid, to be operated to the best advantage, and in the payment of debts and liabilities incurred for such improvements and betterments.

XV.

Further complaining, your orator now shows that the defendant herein, the State revenue agent, proceeding under authority claimed to be invested in him by chapter 126 of the Annotated Code of 1892, as amended by an act of the legislature passed in the year 1894, inaugurated and conducted certain suits against your orator and the said Yazoo & Mississippi Valley Railroad Company, in which he demanded taxes for the years 1892, 1893, 1894, and 1895, such taxes having been assessed against the property that had been the property of the Louisville, New Orleans & Texas Railway Company, and

had been acquired by the said Yazoo & Mississippi Railroad Company by such consolidation of 1892, but not including any taxes upon property that had formerly been property of the Natchez, Jackson & Columbus Railroad Company.

If it is not necessary to set forth in this bill in detail the progress and scope of that litigation, it is sufficient to say that on the 20th day of June, 1898, the supreme court of this State rendered in such cause a decision wherein they held, amongst other things, that the constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation, and it did in express terms overrule the Mississippi Mills case aforesaid, and by necessary consequence overruled all subsequent cases holding the same doctrine, and did in express terms declare that the said section 21 of the Mobile & Northwestern railroad charter was unconstitutional and null and void *ab initio*. By this decision the supreme court of said State overturn and reverse the settled constitutional construction and the constitutional status of said statute and of similar statutes which had been repeatedly declared valid by the supreme court itself for fully twenty years, and had been commonly accepted and acted upon without question, as shown, by all the departments of the State government, executive and legislative as well as judicial, and by the constitutional convention of 1890, and on the faith of which not only the numerous and enormously great pecuniary transactions hereinbefore set forth had been passed, but also upon which all sorts of contracts impossible for your orator to enumerate had been entered into, and all sorts of obligations and liabilities incurred by all sorts of corporations
26 organized and doing business in this State for a quarter of a century.

Your orator further states that such decision and action upon the part of the supreme court, when sought to be practically applied, as it is now being sought to be so applied by the defendants herein, as will be hereafter shown, is subversive of the various contract rights and contract obligations hereinbefore set forth, in which your orator is directly and pecuniarily interested, and is in conflict with the provisions of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of a contract; and is also in conflict with those provisions in the fourteenth amendment to the Constitution of the United States which declare that no State shall deprive any person of his property without due process of law, or deny to any citizen of the United States the equal protection of the law.

XVI.

Further complaining, your orator shows that, relying upon the extraordinary and shocking decision of the said supreme court above mentioned, the defendant in this cause, The State Revenue Agent, proceeding under the claim of authority aforesaid, made application to the State railroad commission, organized as described in the opening portion of this bill, that they should proceed under the said law of 1894, and assess the property hereinbefore described,

which had been the property of the Natchez, Jackson & Columbus Railroad Company, for back taxes for the years 1886, 1887, 1888, 1889, 1890 and 1891, and to assess such taxes against the Yazoo & Mississippi Railroad Company aforesaid as the owner at this time of said property, and against the Natchez, Jackson & Columbus Railroad Company as the owner of the same during the years 1886, to 1890, inclusive. And proceeding under the request of the State revenue agent, as aforesaid, the said railroad commission did on the first day of August, 1898, proceed to assess taxes against the said Yazoo & Mississippi Valley Railroad Company as owner, and the Natchez, Jackson & Columbus Railroad Company as owner, and against said property as aforesaid, all as follows, to wit:

At a valuation of five thousand dollars per mile of track, for the years 1886, 1887, 1888 and 1890; and at the rate of nine thousand dollars per mile of track for the year 1891; the aggregate of such assessment, and of the taxes demanded thereon, being as follows:

1. For the county of Hinds the sum of $—.
2. For the county of Copiah the sum of $—.
3. For the county of Claiborne the sum of $—.

27 4. For the county of Franklin the sum of $—.

5. For the county of Adams the sum of $—.
6. For the city of Natchez the sum of $—.
7. For the city of Fayette the sum of $—.
8. For the city of Harrison the sum of $—.
9. For the village of Martin the sum of $—.
10. For the village of Myles the sum of $—.
11. For the town of Utica the sum of $—.
12. For the town of Learned the sum of $—.
13. For the town of Raymond the sum of $—.
14. For the city of Jackson the sum of $—.
15. For the State of Mississippi the sum of $—.

Making a total assessment of unlawful taxes as aforesaid of more than fifty thousand dollars.

XVII.

Humbly complaining, your orator states further that it exhibits herewith as Exhibit D to this bill, and prays that the same be made a part thereof, the application of the State revenue agent that the said back taxes be assessed, and the findings of said railroad commission pursuant thereto.

Your orator cannot say whether it be true, as stated in the said revenue agent's application and in the said order of the said railroad commission, that the property so proceeded against had not been assessed for taxes, and if material, which it denies, demands strict proof thereof. It may be true, as stated, that it had not been assessed, but if true, your orator states further that the failure so to assess it was the failure of the State's own officers whose duty it was to assess the said railroad property for taxation, and for their failure so to do the said railroad company was not responsible, nor were its successors so responsible.

Your orator charges that if the said officers, whose duty it was

to make said assessment, did fail to make the same, as the State revenue agent claims, such failure was but another instance of the uniform manner in which, as stated above, the privilege of section 21 of the Mobile & Northwestern charter, in respect to this property, was universally recognized by all departments of this State, including the executive or tax-collecting department, and it was because the said officers, composed of the auditor of public accounts, the treasurer of the State and the secretary of the State, whose duty it was, under the Code of 1880, to assess railroads for taxation, regarded the said property as exempt from taxation, and not required to be assessed under the law. However that may be, your orator says that the same is irrelevant and immaterial as to the taxes now sought to be imposed for the years 1886, 1887,
28 1888 and 1889, for the reason that in March, 1890, as stated above, the said Louisville, New Orleans & Texas Railway Company purchased the property of the said Natchez, Jackson & Columbus Railroad Company for value and without notice of any such claim for taxes of those years as is now propounded by the State revenue agent and there was not anywhere, on any of the records of this State or any of the counties, or any of the municipalities in whose right the revenue agent is now pursuing the said property for the taxes of aforesaid, any record of taxes assessed against the same and unpaid, and the said purchaser had no notice of any outstanding unsatisfied liability for taxes for said years, and had no notice but what the said taxes had been duly settled conformably to law. Never having been assessed according to the theory of the revenue agent himself, the same had not become a liability of the property of the company, and constituted no charge upon the property, and the said Louisville, New Orleans & Texas Railway Company took the said property as a *bona fide* purchaser without notice, freed from any such liability to be afterwards created by retroactive assessment.

XVIII.

Your orator further states and shows that as to the said taxes from 1886 to 1889 inclusive, now sought to be collected by assessment this year made as aforesaid, by the State revenue agent, and also as to the said taxes for the years 1890 and 1891, it is irrelevant and immaterial that the same had not been heretofore assessed, for the reason that by the consolidation effected between the Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, as aforesaid, in October, 1892, the said Yazoo & Mississippi Valley Railroad Company, as consolidated, took the property that had been the property of the Natchez, Jackson & Columbus Railroad Company, as well as that which had been the property, originally, of the Louisville, New Orleans & Texas Railroad Company, as *bona fide* purchaser without notice of any such claim for unpaid and unsatisfied taxes, as is by the State revenue agent for the first time propounded. Such taxes had never been assessed against the said property, or against the said Louisville, New Orleans & Texas Railway Company as owner thereof, and had never been

assessed until this proceeding described above, in the year 1898; and your orator states as to all of said taxes it is now unlawful and unconstitutional to attempt by this proceeding, and by a retroactive assessment which will overreach the said contract of consolidation, and will further overreach the said contract of purchase in
29 1890, as to all of said taxes, except those for the years 1890 and 1891, and to effect with the same the holder of said property, who acquired the same in the latter part of the year 1892. Such action, if it were allowed to be effectuated, would impair the obligation of the contract of purchase and the obligation of the contract of consolidation aforesaid, and would be a deprivation of your orator's property and that of all other holders of bonds as aforesaid, for security, as aforesaid, without due process of law, and would be a denial to them of the equal protection of the law.

And on information and belief, your orator avers that in the years 1886, 1887, 1888 and 1889, the said Natchez, Jackson & Columbus Railroad Company paid in each year and in the years 1890 and 1891, the said Louisville, New Orleans & Texas Railway Company, paid in each year taxes which were assessable and demandable under the charter of the Natchez, Jackson & Columbus Railroad Company as amended by the act of August 8th, 1870, as aforesaid, such taxes being paid by the said two companies in the said years, respectively, as named just hereinabove, on the construction debt of the said Natchez & Jackson railroad in exact conformity to the said charter as amended; and in each of said years said companies, respectively, were each qualified and entitled, under the said charter as so amended, to make the affidavits therein provided for and to have and receive from the respective tax collectors the receipts therein provided for, and would have made such affidavits and received such receipts, had the same been assessed conformably to law.

Your orator now further avers that the said Natchez, Jackson and Columbus Railroad Company is extinct, and the said Louisville, New Orleans and Texas Railway Company is extinct, and the persons who were officers of each of said companies, and who were qualified under said charter so amended to make affidavits in said charter provided for, are none of them in the employment or in any way under the control of your orator, or of the said Yazoo and Mississippi Valley Railroad Company, and if the assessment so wrongfully made, as herein stated, on the 2nd day of August, 1898, to have retroactive operation for the years 1886 to 1891, inclusive, shall be allowed to stand, the said affidavits provided for in said charter so amended cannot now be made, although the conditions in said charter in respect to payment on construction debt year by year have been fully met and complied with, and the inability to make such affidavits arises from no fault whatever or neglect of either your orator or said Yazoo and Mississippi Valley Railroad Company, or said Louisville, New Orleans and Texas Railway Company, or of the said Natchez, Jackson and Columbus
30 Railway Company, but arises wholly because of the default of the officers and agents who constituted the board of

railway assessors of the State of Mississippi, and who were in no way subject to the control of any of the railway companies concerned in this matter, or of your orator, or of the said Yazoo and Mississippi Valley Railroad Company.

Your orator avers that the scheme of said charters as amended was manifestly intended by the legislature to be worked out year by year. The question of taxation of the property of the railroad company was intended to be settled in said years in each year, respectively, and it was intended by the statute that, by affidavits made in each year setting forth the proper payments on account of the construction debt, such liability as has been imposed upon the company by assessments for taxation fully made should be discharged and paid off. It never was contemplated by the legislature that long years after any given year had passed, and perhaps long years after the officers who were qualified under the statute to make an affidavit therein called for should have died, or removed, or in any way had gotten beyond the service and control of the railroad companies interested, without the default of said railroads (which, as averred above, is actually what has occurred in this case) by a retroactive assessment reaching over the term of twelve to fifteen years, the company interested could be deprived of its privileges under said statute.

XIX.

Your orator further complains and shows that during the year 1886, and long prior to the purchase by the Louisville, New Orleans & Texas Railway Company of the Natchez & Jackson railroad, as hereinbefore set forth, the said Louisville, New Orleans and Texas Railway Company, executed upon its railway property then owned, and hereafter to be acquired, and upon the rents, issues, tolls, incomes, earnings and profits thereof, a certain first mortgage, bearing date August 25, 1886, for the purpose of securing the sum of $16,900,000 of first-mortgage four per cent. gold bonds, which were to mature on the first day of September, 1934. A copy of said mortgage is herewith filed marked "Exhibit E" and is prayed to be taken as a part of this bill.

On the next day following, the said company did execute its second mortgage, dated August 26, 1886, on its entire railroad property then owned by it or thereafter to be acquired until the length of said railways should amount in the aggregate to 800 miles, together with all rents, tolls, issues, incomes, earnings and profits thereof, to secure its second-mortgage five per cent. gold
31 bonds, payable the first of September, 1934, to an amount not to exceed $20,000 per mile of railroad (and under which mortgage, subsequently, bonds to the amount of $10,000,000 were in fact executed, being the bonds of which your orator purchased over $8,000,000, as hereinbefore stated, in the year 1892). A copy of said second mortgage is herewith filed, marked Exhibit "F," and prayed to be taken as a part of this bill.

And afterwards, the said Louisville, New Orleans & Texas Railway Company, executed a third mortgage, dated August 27, 1886,

commonly called by said company, and those dealing with it, the land-grant income mortgage, sometimes called the income mortgage, upon all of the lands of the said company in the counties of Desoto, Tunica, Quitman, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, and Tate, in the State of Mississippi, not required by said company to be used in the construction or operation of its railroad branches, together with the rents or profits thereof and payments unpaid by parties who had purchased theretofore of said lands, and also upon all the rents, tolls, issues, incomes, earnings and profits of its railways then owned or thereafter to be acquired—such mortgage being for the purpose of securing a third issue of bonds payable fifty years after date, not to exceed $20,000 per mile of railroad, and to bear such interest, not exceeding six per centum per annum as the net earnings and income of said railroad should suffice to pay. A copy of the said land-grant income mortgage is herewith filed, marked Exhibit G, and is prayed to be taken as a part of this bill.

Your orator states further that by the terms of said first and second mortgages, and said land-grant mortgage, the said Jackson & Natchez road, when the same was acquired by purchase by the said Louisville, New Orleans and Texas Railway Company in the year 1890 as aforesaid, became subject to the terms and stipulations and encumbrances of each and every of said mortgages, for the benefit of all holders of each and every series of bonds by said mortgages secured respectively, the said railroads of the said Louisville, New Orleans & Texas Railway Company, even with the addition of the one hundred miles so acquired by it by said purchase, not at that time being so great as 800 miles.

Your orator further avers that the bonds secured by the second mortgage aforesaid on their face stipulated as follows, as will appear from the mortgage itself herewith filed as Exhibit "F."

"The interest on this bond shall be payable only out of the net earnings of the said railway company after making the deductions therefrom provided for in the said mortgage or deed of trust
32 securing the same, and shall not be due any time during the currency of this bond until the amount payable in respect thereof shall have been determined and declared by the board of directors of said railway company. And said interest shall be cumulative and in case less than two and a half per centum be paid in any half year, the unpaid interest, with interest on said unpaid interest, at the rate of five per centum per annum shall be carried forward to the credit of this bond for subsequent payment as such net earnings after said deductions shall suffice therefor, or at the maturity of the bonds. All arrears of such interest, with the accrued interest thereon (so far as the same shall not have been previously paid) shall be paid with the principal of this bond on the first day of September, 1934, and no dividend shall be paid upon the stock of the company or its income bonds until interest hereon, calculated at the rate of five per centum per annum from the first day of September, 1888, and payable semi-annually, together with

the accrued interest on any arrears of such interest, shall have been fully paid."

And the said mortgage provided in respect to the deductions to be made from such net earnings, according to the statement of said bond as follows: That these deductions were to consist of outlays for "all such repairs and replacements as it or they might deem judicious; and all such useful alterations, conditions and improvements as the income coming into its or their hands, shall be adequate to pay for;" and also "the proper expenses of holding, operating and managing said railroad and other premises and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations and additions and improvements upon said property, and all expenses, costs, charges and counsel's fees in the premises of the said party of the second part or its successor in the trust and a reasonable compensation for their services, and next to the payment of the principal and interest of the said bonds according to the tenor and effect thereof, as the same may become due and payable;" and the said bonds on their face provided that they were subject to the bonds of the first mortgage herein aforesaid. Wherefore, in brief, your orator says that the right of the holders of said second-mortgage bonds to receive payment of the coupons of interest thereon was subject to the interest on the first-mortgage bonds and the operating expenses of said railroad and taxes, and if the earnings of said road do not suffice to pay all of said prior charges, the said holders of said second-mortgage bonds were and are not entitled to receive their interest, except to the extent of what sur-lus might in
33 fact be earned over and above such charges until the year 1934.

Your orator further states that the bonds secured by said land-grant income mortgage (of which your orator in the year 1892 purchased over $8,000,000 as aforesaid) were issued to the amount of, to wit: $10,000,000 in round numbers, and each of said bonds, as is shown by said Exhibit G, herewith filed, stipulated on its face in respect to the interest thereon as follows: That said interest should be payable "annually, on the first day of November in each year, at its agency in New York city, on presentation of this bond for endorsement of such payment thereon, such interest on said principal sum (not exceeding, however, six per cent. per annum) as the net earnings of said railway company from its railways in each current year ending on the 1st day of July next preceding the day above fixed for the payment of the annual interest hereon, shall suffice to pay upon all the bonds of this issue outstanding on such first day of July, after first paying from the earnings and the income of said company from said railways, the expenses of operating said railways, and of keeping up and maintaining the same with their appurtenances, and of all improvements, additions, betterments, renewals, acquisitions, and of providing and keeping up suitable equipments and the expense of conducting said company's business and affairs and maintaining its corporate organization, and for

likewise paying from said earnings and income the interest payable from time to time upon such other bonds of said company, or its successors, as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof. And if in any year the amount as ascertained and determined to be applicable to the payment of this issue, shall not be sufficient for the full payment of interest at the rate of six per cent. per annum thereon, the amount of such deficiency, whether partial or total, shall not be cumulated or be made up out of any surplus income of subsequent years, but shall be absolutely waived, relinquished and discharged."

Wherefore, your orator states that the interest to be received by it and by other holders of said income bonds is contingent entirely and absolutely from year to year upon the net earnings of said road after the payment of the coupons of interest on the first and second mortgages in full, and the operating expenses of said road and taxes and is not cumulative all as is shown in said Exhibit F.

Your orator further states that prior to the year 1893 the entire earnings of the property of the said Louisville, New Or-
34 leans & Texas Railway Company, including the property of the Natchez & Jackson road, so purchased in the year 1890, were not sufficient to pay the charges as aforesaid, which had to be paid off before the holders of the second-mortgage bonds, aforesaid, were entitled to receive any payment on their said coupons of interest, and before the said holders of said income mortgage bonds were entitled to receive any interest on account of their said bonds. That beginning with the year 1893, under the new management inaugurated in October, 1892, the earnings of such company were sufficient to enable it to pay off said charges which were prior to the right and claim of the holders of the second mortgage for their interest, and leaving a balance in hand available to the payment of such second-mortgage interest, and it was paid accordingly to the holders of the second-mortgage bonds, so far as the same would go in payment of their coupons of interest, to the amounts following, to wit:

Paid on second-mortgage coupons, Sept. 1, 1893.....	$198,451.42
Paid on second-mortgage coupons, Sept. 1, 1894.....	219,133.75
Paid on second-mortgage coupons, Sept. 1, 1895.....	261,901.26
Paid on second-mortgage coupons, Sept. 1, 1896.....	500,837.00
Paid on second-mortgage coupons, Sept. 1, 1897.....	470,441.28
Total.....	$1,650,764.71

Your orator states that the amount of interest payable on said second-mortgage bonds for and from the year 1890 (which was the year as aforesaid in which the said Natchez & Jackson railroad property became subject to the operation of said mortgages as aforesaid), to the year 1897, inclusive, was the sum of $4,000,000, and the said payments made on account thereof, during the years 1893 to 1897, as stated just above, was not sufficient to satisfy the said

coupons by the sum of $2,349,253.29, without making any allowance whatever for the stipulated five per cent. interest on unpaid coupons.

Your orator states further that in such condition of affairs it is obvious, and your orator states it to be a fact, that said earnings have never sufficed to pay anything whatever in the way of interest on said land-grant income bonds.

Your orator states further that not only has the said State revenue agent inaugurated the proceedings hereinbefore described to collect taxes as aforesaid upon the property that was property of the Natchez, Jackson & Columbus Railroad Company, for the years 1886 to 1891, inclusive, but also the said State revenue agent
35 is now conducting a suit in the chancery court in Hinds county in the State of Mississippi, whereby he demands the payment of taxes upon the same property amounting to about the sum of $125,000 for the years 1892 to 1897 inclusive, in which suit the said State revenue agent is seeking to set aside and disregard the said charter of said railroad company, and the right of said Yazoo & Mississippi Valley Railroad Company thereunder in that particular; furthermore said State revenue agent is also prosecuting in the said chancery court of Hinds county, Mississippi, another suit of similar nature, demanding taxes on account of the property that was the original property of the said Louisville, New Orleans & Texas Railway Company, not including the property of the said Natchez & Jackson Railroad Company as aforesaid, which property came to the said Yazoo & Mississippi Valley Railroad Company by the consolidation of 1892 aforesaid, to the amount of $415,000 for the years 1886 to 1891 inclusive. And furthermore, the said State revenue agent is prosecuting a suit at law in the circuit court of Hinds county, State of Mississippi, for taxes upon the said Louisville, New Orleans & Texas Railway Company's property as last aforesaid, being taxes claimed for the years 1892 to 1897 inclusive, amounting to $548,000. In both of said last-named suits the said State revenue agent, assails, and seeks to set aside the same identical section 21 of the Mobile & Northwestern charter as aforesaid, which by the act of 1882, under which the said Louisville, New Orleans & Texas Railway Company was organized, was incorporated into the charter of said last-named company and became a part thereof.

Your orator states further that if the proceedings which it is herein sought to enjoin should be permitted to continue, and if the said State revenue agent should be allowed to collect said taxes so wrongfully claimed by him for the years 1886 to 1891, inclusive, (which said taxes, your orator protests and states are not owing at all), the effect of such collection will be as follows: that said taxes amounting to about the sum of $60,000 will have to be paid out of the net earnings aforesaid, including the net earnings of the railroad from Natchez to Jackson, and to that extent will reduce those earnings and the earnings of the property derived from the said Louisville, New Orleans & Texas Railway Company in such year or years as said taxes shall be collected and the payment thereof unlawfully compelled, to the great loss and damage of your orator

and of the other holders of said second-mortgage bonds of the Louisville, New Orleans & Texas Railway Company; and also of your orator and of the other holders of said land-grant income bonds of the said Louisville, New Orleans & Texas Railway Company, and
36 in each instance the loss and damage to your orator will be in the proportion of about four-fifths of the whole amount of taxes so collected. And further, if the said revenue agent should prevail in the three suits above mentioned, in addition to the amount of loss and damage hereinbefore just set forth, there will be a further loss and damage inflicted upon your orator and other holders of said second-mortgage and income mortgage bonds, to the amount of $1,080,000 of which, including the amount in the proce-ding herein -ought to be enjoined, $475,000 will be on account of transactions which occurred prior to the purchase of any of said bonds by your orator as aforesaid in the year 1892, and of which your orator purchased, as aforesaid, in entire ignorance of the aforesaid demands now made, and by virtue of a claim which was not presented by the State prior to the purchase aforesaid, and not presented until long after such purchase aforesaid, by retroactive assessments of taxes not warranted by law. And, furthermore, this unjust and inequitable result will be worked out under and pursuant to the revolutionary and subversive decision of the said supreme court of June 20th, 1898, fundamentally altering the established rule of law applicable to the case, so established for more than twenty years as aforesaid.

And your orator says that such collections of said taxes will impair the obligation of your orator's contract of purchase of the said bonds as aforesaid in violation of the protection afforded by the Constitution of the United States; and also will deprive it of its property without due process of law, and will withhold from it the equal protection of the law, in violation of the fourteenth amendment of the said Constitution.

XX.

Your orator further complains, and states that the said Taylor case, mentioned above, was and is *res adjudicata* as between the said Louisville, New Orleans & Texas Railway Company, on the one hand, and the said State of Mississippi on the other, which in said litigation was represented by its authorized tax-collecting officer, as to the question of the legality and sufficiency of the privilege conferred by said section twenty-one, and the constitutionality thereof, and the right of the said Louisville, New Orleans & Texas Railway Company thereunder, and being such *res adjudicata* as between said company and said State, the said Yazoo & Mississippi Valley Railroad Com*a*pny, which is its successor, is entitled to the benefit thereof; and your orator also so entitled, since your orator is protected by all rights and defenses of said Yazoo & Mis-
37 sissippi Valley Railroad Company; and being such *res adjudicata* as against the State of Mississippi, it is also *res adjudicata* as to each and every county and municipality of said State in regard to matters of taxation, such counties and municipalities

having their right to impose taxes only by delegation of such State. And your orator invokes the same as *res adjudicata* accordingly.

XXI.

And your orator further says that the said Lambert case, mentioned above, is also *res adjudicata* as between the Yazoo & Mississippi Valley Railroad Company, which was one of the two complainants in said cause, on the one hand, and the State of Mississippi on the other hand, as to the sufficiency of said privilege conferred by section 21 of the Mobile & Northwestern charter, as imported into the charter of the Natchez, Jackson & Columbus Railroad Company, and its constitutionality; and also in regard to the right of enjoyment thereof of the said Yazoo & Mississippi Valley Railroad Company since the said sale of 1890, and since the said consolidation of 1892; and being such *res adjudicata* in favor of the said Yazoo & Mississippi Valley Railroad Company, your orator is entitled to the protection thereof, since it is entitled to all the protections and defenses of the Yazoo and Mississippi Valley Railroad Company in this proceeding; and since the said decision was *res adjudicata* as against the State of Mississippi, which was represented therein by its legally accredited officer, the tax collector and sheriff of Adams county, it is also *res adjudicata* against each and every county and municipality in said State of Mississippi, which derive their right to impose taxes alone by delegation from said State. Your orator relies upon the same as such *res adjudicata*.

XXII.

And your orator further complains and shows that the State of Mississippi, and the various counties and municipalities in whose behalf the said State revenue agent and said board of railroad commissioners are prosecuting the proceeding herein sought to be enjoined, are estopped by the facts hereinbefore set forth in all their detail, from further proceeding at this date and in the manner above stated, to collect the said taxes hereinbefore pretended to be owing and collectible as stated. Your orator relies upon the same as set forth above as an estoppel against the said State and said counties and the said municipalities, and against the said revenue agent, whose right to proceed is derivative entirely from them.

XXIII.

38 Your orator further complains and states that the assessments of taxes hereinbefore mentioned, when made, as the said railroad commission threatens to make the same, are required by law to be sent down to the clerks of the boards of supervisors of the respective counties, who are required to file the same and preserve the same as a public record, and also to send same to the authorities of each municipality along the line of said railroad in favor of which municipality any assessment shall be made by the said railroad commission; and thereupon, the tax collectors of said counties and said municipalities are required to

proceed to collect the same by seizure of the property of said railroad in the manner prescribed by law, if the same be not voluntarily paid; and the said railroad commission, acting therein, in conformity with their pretended duty, under the law, threaten to certify and send down the said record of assessment, illegal although it be, to the said clerks of the board- of supervisors of the counties of Adams, Jefferson, Claiborne, Copiah and Hinds, and also to the authorities of the various municipalities through which the line of said railroad runs, in order that the same may be proceeded with according to law. Your orator is thereupon threatened with a multiplicity of seizures and suits, brought for the purpose of collecting the said pretended taxes, unlawful although it be.

And the said revenue agent, your orator is informed and believes and charges, threatens in his legal capacity as representative under the law of the State of Mississippi, and of said counties and municipalities to bring a suit for the recovery of the taxes so assessed. Wherefore, your orator says, that for the prevention of multiplicity of suits, this court on its chancery side, should take jurisdiction of the same by its writ of injunction, and adjudicate the matters and questions herein raised, both in the Federal questions, and the questions of *res adjudicata* and estoppel, all as set forth hereinbefore.

XXIV.

Your orator further complains and shows that under and by virtue of the laws of the State of Mississippi, the said assessment when made, whether the same be lawfully made or not, in this particular instance, will constitute a lien upon the railroad property running from the city of Jackson, to the city of Natchez, in said State, preferential in law to all mortgages and other liabilities, and will cast a cloud upon the title to said property to the great injury of your orator, and to the great injury of the holders of the said first-mortgage bonds of the said Natchez, Jackson & Columbus Railroad Company, and of the holders of the said first and
39 second mortgage bonds of the Louisville, New Orleans & Texas Railway Company, of and for which the said Natchez, Jackson & Columbus railroad bonds are collateral. Wherefore this court, proceeding on its chancery side, should take jurisdiction of this cause in order to prevent such cloud being cast upon the title to said property as aforesaid, to the great injury of the parties aforesaid, to the extent of sixty or seventy thousand dollars as aforesaid.

XXV.

Your orator further complains and shows that it cannot even pay this tax under protest, and sue to recover back the taxes, nor can the said Yazoo & Mississippi Valley Railroad Company do so, without being subjected to the burden of a multiplicity of suits as aforesaid. Furthermore, that even if your orator and the said Yazoo & Mississippi Valley were to pay the same under protest, and sue to recover the same back, and should recover judgment for the same,

after undergoing the burden of such multiplicity of litigation, because of the peculiar constitutions of municipalities and counties, it is quite doubtful if the judgments recovered against them could ever practically realize a return of the said taxes, or realize such return without a very great reduction in the practical results because of costs and expenses; and so far as such a suit against the State of Mississippi is concerned, a judgment recovered against said State would doubtless be worthless and of no value, since an execution cannot be had against the same in any form, and it would be purely and wholly optional with the legislature whether it would or would not ever pass a bill of appropriation to return said moneys.

Wherefore your orator and the said Yazoo & Mississippi Valley Railroad Company would be without any effectual remedy at law.

XXVI.

Your orator further complains and shows that it has no complete, nor adequate, nor sufficient remedy in the courts of law, and is relievable only in the courts of equity.

Wherefore, the premises considered, your orator prays that it be permitted to bring this its bill against Wirt Adams, revenue agent, and J. J. Evans, and M. M. Evans, and John D. McInnis, State railroad assessors, and the railroad commission, and against Thomas C. Kimbrough, clerk of said commission, and against the Yazoo & Mississippi Valley Railroad Company, and that subpœnas to answer this bill be issued to the said defendants commanding them to appear, according to the rules of this court, by a day certain and answer the allegations thereof, but not under oath which is expressly waived.

40 Your orator further prays that a writ of injunction issue from this honorable court enjoining and restraining the said defendant- the said railroad assessors aforesaid, from approving, and the said assessors and the clerk aforesaid, from certifying the said assessment of taxes on the said railroad from Natchez to Jackson aforesaid that was formerly the property of the Natchez, Jackson & Columbus Railroad Company, for any of the years 1886 to 1891, both inclusive, to the several counties through or into which the said road passes, or any of them, or to any of the cities or towns along the said line of railroad; and also from approving or certifying said record of assessments and taxation, and from approving and certifying the valuation which they have fixed as such board of assessors aforesaid upon the said Natchez & Jackson railroad; and from certifying their action as said State board of assessors to any county, town, or individual whatever, until the further orders of this court.

And your orator prays that the said Wirt Adams, revenue agent aforesaid shall be enjoined from beginning, by himself, his attorneys, solicitors or agents, or advising or inviting any of the counties, or towns to begin any suit for the recovery of any judgment or decree for said taxes or for the enforcement of the alleged lien for taxes for any of the years mentioned in this bill, and from taking

any proceeding looking to the subjection of the property of your orator, or of the railroad known as the Natchez & Jackson railroad, to the payment of the taxes so claimed as aforesaid for the years 1886 to 1891, both inclusive, or any of them, until the further orders of this court.

And your orator prays that on the final hearing of this cause said injunction may be made perpetual, and that the property of your orator and the said Natchez & Jackson railroad may be adjudged and decreed to be exempt from State and county taxation for the years aforesaid, and that the contract of exemption, as shown by the charter of the said Natchez & Jackson Railroad Company and said section twenty-one of the said Mobile & Northwestern charter as applied thereto by the act of 1870, be declared valid and binding, both as to the State and counties and municipalities therein for the term of thirty years from the date of said charter; and also that the assessment made as aforesaid by the said railroad commission be decreed to be null and void, and the cloud upon the title and right of your orator aforesaid be removed.

And may it please your honors to grant to your orator such other, further and additional relief as in equity it may be entitled to, as under the circumstances are required.

41 This is the first application for a writ of injunction in this case, and as in duty bound, your orator will ever pray.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By MAYES & HARRIS, *Sol'rs.*
MAYES & HARRIS,
Solicitors for Complainant.

JAMES FENTRESS, *Of Counsel.*

STATE OF MISSISSIPPI, }
County of Hinds. }

Personal- appeared before me the undersigned A. C. Jones, notary public, Edward Mayes, with whom I am personally acquainted, and whom I know to be attorney and solicitor of the Illinois Central Railroad Company, and made oath in due form of law that he is attorney and solicitor for the Illinois Central Railroad Company, and that he has read the foregoing and attached bill of complaint, and that the facts stated therein as of his own knowledge are true, and these stated on information or advice, he believes to be true.

EDWARD MAYES.

Sworn to and subscribed before me this 4th day of August, 1898, as witness my hand and official seal.

A. C. JONES,
[SEAL.] *Notary Public.*

To L. B. Moseley, clerk of the circuit court, southern district of Mississippi:

You will issue the writ of injunction as prayed for in the foregoing bill upon the defendants entering into bond with good and

sufficient securities in the sum of ten thousand dollars, to be approved by you.

August 4th, 1898.

H. C. NILES, *Judge.*

Filed Aug. 5, 1898.

L. B. MOSELEY, *Clerk.*

EXHIBIT A TO O. BILL.

N., J. & C. R. R. Co.
and
L., N. O. & T. R'Y Co.

Conveyance of N., J. & C. R. R.

28 March, 1890.

42 This indenture, made and entered into this the 28th day of March, 1890, by and between the Natchez, Jackson and Columbus Railroad Company of the first part, and the Louisville, New Orleans and Texas Railway Company, of the second part—witnesseth:

That the party of the first part, in consideration of the sum of one hundred and eighty thousand dollars, lawful money of the United States, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged has granted, bargained, sold, assigned, transferred and conveyed, and hereby grants, bargains, sells, assigns, transfers and conveys unto the party of the second part, its successors and assigns forever, all the railroad and other property of the party of the first part lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities unto said party of the first part appertaining or belonging.

To have and to hold to the said party of the second part, its successors and assigns forever, subject, however, to the existing mortgage from the said party of the first part to the Farmers' Loan and Trust Company, trustee, dated September 1st, 1882, securing outstanding bonds of the party of the first part, to the amount of their par face value of not exceeding one million two hundred and fifty thousand dollars, and subject to the current interest thereon.

And in consideration of the premises, the party of the first part has undertaken, covenanted and agreed and hereby undertakes, covenants and agrees to and with the party of the second part to provide for the interest which matured on or prior to March 1, 1890, on bonds secured by the mortgage above referred to, and to provide for the payment of all other unpaid indebtedness and obligations of the party of the first part accruing from and after May 1st, 1889.

In witness whereof, the party of the first part has caused these presents to be executed on its behalf by its president and its cor-

porate seal hereunto affixed and attested by its secretary, the day and year first above written.

NATCHEZ, JACKSON AND COLUMBUS RAILROAD COMPANY,

[SEAL.] By T. J. NICHOLLS, *President.*

JOS. T. PENTON, *Secretary.*

STATE OF MISSISSIPPI, }
Adams County. }

Personally appeared before me, J. Chas. Carson, a justice of the peace, and *ex officio* notary public, in and for the county and
43 State aforesaid, the within-named J. T. Nicholls and Jos. T. Penton, who being by me duly sworn, deposed, say and acknowledge that they signed and delivered the foregoing deed on the day and year therein named, as the act and deed of the Natchez, Jackson and Columbus Railroad Company, the said T. J. Nicholls deposing and acknowledging that he signed and delivered said deed as president of said company, and by the authority of a resolution of the board of directors of said company, and as the secretary of said company, and the said T. J. Nicholls and Jos. T. Penton further depose, say and acknowledge that they know the corporate seal of said Natchez, Jackson and Columbus Railroad Company, and that the seal so affixed to said deed is the seal of the Natchez, Jackson and Columbus Railroad Company, and was so affixed by the order of the board of directors of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 28th day of March, A. D. 1890.

J. CHAS. CARSON,
J. P. and ex Officio Notary Public.

EXHIBIT B TO O. BILL.

Financial Improvement Company and Union Trust Company of New York, trustee.

Collateral trust.

Dated November 1, 1890.

An indenture made and entered into this first day of November, 1890, by and between the Financial Improvement Company, a corporation created, organized, and existing under the laws of the State of Colorado, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, heretofore and under date of the first day of September, 1882, the Natchez, Jackson, and Columbus Railroad Company executed a certain indenture of mortgage or deed of trust to the Farmers' Loan and Trust Company, of the city of New York,

to secure the payment of an issue of its first-mortgage six per cent bonds, bearing date September 1, 1882, and payable on the first day of September, 1912, which said indenture of mortgage or deed of trust has been duly recorded in the proper counties, and still remains in full force and effect; and

Whereas, the Louisville, New Orleans and Texas Railway
44 Company heretofore, and under date of August 25, 1886, executed an indenture of mortgage or deed of trust to the party of the second part to these presents to secure an issue of the first-mortgage four per cent. gold bonds, bearing date first day of September, 1886, and payable on the first day of September, 1934; and

Wh-reas, the said Louisville, New Orleans and Texas Railway Company, heretofore, and under date of August 26th, 1886, executed a further indenture of mortgage or deed of trust to the party of the second part to these presents securing an issue of its second-mortgage bonds, bearing date the 1st day of September, 1886, and payable on the 1st day of September, 1934; and

Whereas, simultaneously with the execution hereof the party of the first part has deposited with the party of the second part, upon the terms, provisions and conditions hereinafter expressed, first-mortgage bonds of the said Natchez, Jackson and Columbus Railroad Company, issued under and secured by such indenture of mortgage or deed of trust, bearing date the 1st day of September, 1882, to the amount, at their par face value, of one million two hundred and fifty thousand dollars, with coupons appertaining thereto from and including the coupon which matured on the first day of March, 1890:

Now, therefore, this indenture witnesseth, that in consideration of the premises and the mutual undertakings and covenants and agreements hereinafter contained, and of one dollar by each of the parties to these presents to the other in hand paid, the receipt whereof is hereby acknowledged, the parties have undertaken, covenanted and agreed and do hereby undertake, covenant and agree, to and with each other as follows:

First. The said party of the second part will and does hereby accept and receive such first-mortgage bonds of the said Natchez, Jackson and Columbus Railroad Company so deposited with it under this trust.

Second. There shall be forthwith conspiciously stamped across the face of such bonds the words and figures following: "This bond is deposited with the Union Trust Company of New York, or its successors, under and in pursuance of the indenture between the Financial Improvement Company and said trust company, dated November 1, 1890, and subject to all terms, provisions and conditions of the said indenture."

Third. All the first-mortgage six per cent. bonds of the said Natchez, Jackson and Columbus Railroad Company (together with the coupons appertaining thereto) so deposited with said party of the second part, or its successors in this trust, under and in
45 pursuance of this indenture, shall be held by said party of the second part, or its successors in this trust, with all the rights

and privileges in anywise belonging or appertaining to such bonds or coupons, or to the holders thereof, whether in respect to the security afforded by the indenture of mortgage or deed of trust securing the same, or otherwise howsoever, as a trust fund for the benefit and security, in the first instance, of all person- and corporation- who or which may be or become the holders of first-mortgage four per cent. gold bonds of the said Louisville, New Orleans and Texas Railway Company, or its successors, issued under and secured by the deed of trust bearing date the 25th day of August, 1886, hereinbefore referred to, without any preference, priority or advantage in favor of any of the holders of such first-mortgage four per cent. gold bonds over any of the others thereof, and as a security for the payment of the principal and interest of all such first-mortgage four per cent. gold bonds which may be at — time outstanding, and in the second instance, and when the whole of such first-mortgage four per cent. gold bonds shall have been fully paid and discharged, principal and interest, but not otherwise, for the benefit and security of all persons and corporations who or which may be or become the holders of any of the said second-mortgage bonds of said Louisville, New Orleans and Texas Railway Company, or its successors, without any preference, priority or advantage in favor of any of the holders of such second-mortgage bonds over any of the others thereof and as a security for the payment of the principal and interest of all such second-mortgage bonds which may at any time be outstanding.

Fourth. Notwithstanding such deposit of such first-mortgage six per cent. bonds of the said Natchez, Jackson and Columbus Railroad Company, and the coupons appertaining thereto, the same shall remain in all respects in full force and effect as outstanding obligations of said Natchez, Jackson and Columbus Railroad Company, and the liens appertaining thereto under the mortgage by which the same are secured shall continue and be maintained until payment shall have been made by the Louisville, New Orleans and Texas Railway Company, or its successors, of the entire principal and interest of such first-mortgage four per cent. gold bonds, and of such second-mortgage bonds as may have been or may be issued under the indentures of mortgage or deeds of trust in that regard hereinbefore mentioned respectively; and if for any cause the mortgage securing such first-mortgage six per cent. bonds of said Natchez, Jackson and Columbus Railroad Company shall be foreclosed, or if any sale shall be made of the property covered by such mortgage, or any part thereof, which shall in anywise
46 cut off or impair the lien of such mortgage, the said party of the second part, or its successors in this trust, shall be entitled to and shall exercise all the rights, privileges and powers which any other holder of such deposited six per cent. bonds would be entitled to exercise, including the bidding for and purchase of the mortgaged premises, or any part thereof by said party of the second part or its successors in this trust, or by any one by it or them authorized so to bid for and purchase the same on its or their behalf, or for its or their benefit, and including the use of such

bonds or any part thereof to pay for such mortgaged premises, or any part thereof so purchased, subject only in respect to the manner of exercising the same in any such case to the directions of the holders of a majority of such outstanding first-mortgage four per cent. gold bonds, if they should see fit to give such directions.

Fifth. When the principal and interest of all such first-mortgage four per cent. gold bonds and such second-mortgage bonds as shall have been issued under the indentures of mortgage or deeds of trust securing the same respectively as hereinbefore stated, and such costs, charges and expenses as shall have in anywise — incurred in or about the execution of the trust hereby created, shall have been fully paid and satisfied, then the said deposited first-mortgage six per cent. bonds shall be deemed to have been also paid and satisfied, and such deposited bonds shall thereupon be cancelled.

Sixth. In case the said Natchez, Jackson and Columbus Railroad Company, or its successors, should at any time before any default in the payment of the interest on such first-mortgage four per cent. gold bonds, or such second-mortgage bonds of the Louisville, New Orleans and Texas Railway Company or its successors, be desirous of or assent to extending to the first day of September, 1934, the date of the maturity of such deposited first-mortgage six per cent. bonds of said Natchez, Jackson and Columbus Railroad Company, such bonds to bear interest during such extension at the rate of six per cent. per annum payable semi-annually, the party of the second part is authorized and directed to assent to such extension and to the stamping upon each of such deposited first-mortgage bonds of the Natchez, Jackson and Columbus Railroad Company suitable words and figures expressing such extension thereof, provided that in making any such extension it shall be expressly provided by the terms thereof that the same is made without prejudice to the lien of the mortgage securing such six per cent. bonds and that notwithstanding such extension such extended bonds are to re-
47 main secured by the lien of such first mortgage of the Natchez, Jackson and Columbus Railroad Company, with the like effect as the bonds deposited hereunder and now secured thereby, and that such extension is conditional upon the preservation of such lien of the said first mortgage in favor of the bonds as so extended.

Seventh. The said party of the second part shall not, nor shall any of its successors in this trust take any proceedings for or in respect of any default in the payment of any interest obligations upon such deposited first-mortgage six per cent. bonds or take any steps, or request the trustee under the mortgage securing such deposited first-mortgage six per cent. bonds to take any steps for or towards the taking possession or foreclosure or sale under the mortgage securing such deposited bonds, unless or until the holders of one-sixth part of the first-mortgage four per cent. gold bonds of said Louisville, New Orleans and Texas Railway Company or its successors at any time outstanding shall so request, but upon such request, and upon being properly indemnified against the costs to be thereby incurred, the said party of the second part or its suc-

cessors in this trust shall take such steps, or request the trustee under the mortgage securing such deposited bonds to take such steps, for taking possession, foreclosing or selling under such mortgage securing such deposited six per cent. bonds, as may seem to the party of the second part or its successors in this trust to be proper and for the best interest of the holders of the first-mortgage four per cent. gold bonds of the Louisville, New Orleans and Texas Railway Company or its successors for which they are so deposited as security.

Eighth. If default shall be made in the payment of the principal or interest moneys mentioned in the said first-mortgage four per cent. gold bonds of the Louisville, New Orleans and Texas Railway Company or its successors, or any or either of them, or any part thereof, according to the tenor and effect of the said bonds or the coupons appertaining thereto, and such default shall continue for the period of six months, then and in that event the said party of the second part and its successors in this trust, is and are hereby authorized, empowered and directed, at the request of the holders of one-third in amount of the said first-mortgage four per cent. gold bonds then outstanding, to do and cause to be done all such acts and things, and to take and cause to be taken all such steps and proceedings, as the said party of the second part, or its successors, shall be entitled to do or take, or cause to be done or taken, either by itself or themselves, or by any or through the trustees or
48 trustee of the indenture of mortgage or deed of trust securing such first-mortgage six per cent. bonds, for or in respect of any then existing default upon such deposited first-mortgage six per cent. bonds, or the interest obligations thereon, and to do all such acts and take all such steps and proceedings as the said party of the second part, or its successors, by virtue of its or their holding of such deposited first-mortgage six per cent. bonds, and by virtue of the then matured or maturing interest obligations thereon, shall be in anywise authorized or empowered to do or take, either under the mortgage securing such first-mortgage six per cent. bonds, or otherwise howsoever.

And the said party of the second part and its successors are authorized, empowered and directed to do the like acts and take the like steps and proceedings, upon the request of the holders of one-third in amount of such second-mortgage bonds then outstanding, if after payment and satisfaction of such first-mortgage four per cent. bonds there shall exist any default in respect of the payment of the principal of, or any obligations or interest on, the said second-mortgage bonds, or either or any of them or any part thereof.

Ninth. Any and all moneys, choses in action, or other things of value which the said party of the second part, or its successors in this trust, may at any time receive for or on account of any interest obligations on, or obligations for principal of, any of such deposited first-mortgage six per cent. bonds, whether by voluntary payment or delivery or by or through any entry into possession of the mortgaged premises, or any part thereof, under the mortgage securing

such last-mentioned bonds, or any receivership of such mortgaged premises, or any part thereof, or by or through any foreclosure proceedings under said mortgage, or otherwise however, shall be applied, in the first instance to or towards the *pro rata* payment of any interest obligation, or obligations for principal of, such first-mortgage four per cent. bonds, which may then be unpaid; and, in the second instance, after such first-mortgage four per cent. gold bonds shall have been fully paid and satisfied, to or towards the *pro rata* payment of any interest obligations on, or obligation for principal of, such second-mortgage bonds which may then remain unpaid; and so from time to time until the whole of the interest and principal of all such first-mortgage four per cent. gold bonds, and such second-mortgage bonds which may be at any time outstanding, shall have been fully paid, discharged and satisfied; provided, however, that if any such moneys, choses in action or things of value, are received before default in the payment of the principal of, or interest
49 on, such first-mortgage four per cent. gold bonds of the Louisville, New Orleans and Texas Railway Company or its successors; or in any case all such four per cent. bonds shall have been paid off, principal and interest, then before default in the payment of the principal of, or interest on, such second-mortgage bonds, the same shall be held and invested as security for the said first-mortgage four per cent. bonds and second-mortgage bonds of the Louisville, New Orleans and Texas Railway Company or its successors upon the like terms and in the like order as in article third hereof prescribed; and provided, further, that if the said party of the second part or its successors in this trust, by itself or themselves or any one acting for it or them or on it- or their behalf hereunder, should purchase the said mortgaged premises, the same may be by it conveyed to the Louisville, New Orleans and Texas Railway Company or its successors upon said railway company or its successors executing proper mortgages thereon to the trustees under the respective mortgages securing such first mortgage four per cent. gold bonds and such second-mortgage bonds of the Louisville, New Orleans and Texas Railway Company imposing upon such mortgaged premises liens in favor of said first-mortgage four per cent. gold bonds and such second-mortgage bonds respectively of like character and in the like order as are imposed by the mortgages securing such respective classes of bonds upon the premises covered by such mortgages respectively; or may cause such mortgaged premises to be conveyed to an individual or corporation, which shall execute his or its first-mortgage gold bonds, to the amount of not less than one million two hundred and fifty thousand dollars, bearing interest, payable semi-annually, at the rate of six per cent. per annum, and secure the same by first mortgage upon the mortgaged premises so conveyed to him or it, and deposit such bonds so secured with the trustee under this agreement upon the like terms and conditions on which the existing six per cent. bonds of the Natchez, Jackson & Columbus Railroad Company are deposited hereunder.

Tenth. In case of the resignation or insolvency of the party of

the second part, or its successor or successors, or its or their incapacity or inability to act in the execution of this trust, the holders of a majority in interest of such outstanding first-mortgage four per cent. gold bonds, or in case all the said first-mortgage four per cent. bonds should have been paid off, principal and interest, then the holders of a majority in interest of such outstanding second-mortgage bonds may select or designate one or more competent persons, or a corporation, to execute said trust, and the person or persons or corporation so selected shall be thereupon entitled to receive and hold all such deposited first-mortgage six per cent. bonds subject to the trusts herein stated and declared, and shall have all the rights and privileges and be subject to all the duties expressed in this indenture. In case of failure of the bondholders to fill such vacancy in the manner above prescribed, the president for the time being of the Louisville, New Orleans & Texas Railway Company, shall make a temporary appointment for such vacancy, which shall continue until the holders of a majority in interest of said outstanding first-mortgage four per cent. gold bonds, or the holders of a majority in interest of said outstanding second-mortgage bonds shall have designated a new trustee or trustees to act hereunder as hereinbefore prescribed. When the holders of a majority in interest of the said outstanding first-mortgage four per cent. bonds, or in the case above prescribed therefor, the holders of a majority in interest of the said outstanding second mortgage bonds shall, by any instrument in writing, or concurrent instruments in writing, executed by themselves or their attorneys-in-fact, designate a new trustee or new trustees under this indenture, the estates, powers, rights and privileges of any trustee hereunder under any such temporary appointment shall immediately cease and determine, and be transferred to and vest in the new trustee or new trustees so designated and thereupon such new trustee or new trustees shall hold such estates, rights, powers, and privileges with like effect as if he, or they had been designated as the party of the second part hereunder.

Eleventh. Upon the request in writing of the Louisville, New Orleans and Texas Railway Company, or its successors, and of the holders of a majority of all the said first-mortgage four per cent. gold bonds at the time outstanding, or in case all the said first-mortgage four per cent. gold bonds should have been paid off, principal and interest, then upon the request in writing of the Louisville, New Orleans & Texas Railway Company, or its successors, and of the holders of a majority of all the said second-mortgage bonds at the time outstanding, all or any part of the said first-mortgage six per cent. bonds deposited hereunder, together with the coupons appertaining thereto, shall be cancelled; and upon the like request the parties thereto shall have the power to add to, modify or alter the provisions of this trust as they may deem expedient.

Twelfth. Any and all costs, charges and expenses incurred in or in respect of or in connection with the execution of this trust, by or on behalf of the said party of the second part, or its successors in

this trust, or for which the said party of the second part or
51 its successors shall be or become in any way liable or responsible, are to be borne and defrayed by the said Louisville, New Orleans and Texas Railway Company, which, concurrently with the execution hereof, has undertaken and agreed that it will, upon demand, pay any and all such costs, charges and expenses, including therein just and reasonable compensation to said party of the second part, or its successors, for such services, as it or they may be called upon to render in or about or in request of the trust hereby created.

Thirteenth. The party of the second part hereby accepts the trusts created and declared by this indenture, but with the understanding, and it is hereby expressly provided and agreed that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents, to do any of the matters or things herein provided for, and that no other liability or responsibility shall under any circumstances be borne by or attach to it than for the exercise of reasonable diligence only in the performance of said trusts, when action on its part for that purpose shall become necessary.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective presidents and secretaries, the day and year first above written.

FINANCIAL IMPROVEMENT COMPANY,
By I. U. GRAVES, *President.*

Attest: F. H. DAVIS, *Secretary.*

[Seal the Financial Improvement Company, 1882.]

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

[Seal Union Trust Company of New York, 1864.]

Attest: A. O. RONALDSON, *Secretary.*

Exhibit C to Original Bill.

Articles of Consolidation.

These articles of consolidation, made this 24th day of October, A. D. 1892, by and between the Louisville, New Orleans and Texas Railway Company, a corporation of the States of Tennessee,
52 Mississippi and Louisiana, party of the first part, and the Yazoo and Mississippi Valley Railroad Company, a corporation of the State of Mississippi, party of the second part, witnesseth:

That under and by virtue of the charters of the respective parties hereto and of the laws of the respective States of Tennessee, Mississippi and Louisiana, in such case made and provided, the said parties of the first and second parts have mutually covenanted and agreed and do hereby mutually covenant and agree to and with each other, to unite, merge and consolidate their several capital

stocks, corporate rights, franchises, immunities and privileges and properties of every kind, real, personal and mixed, upon the following terms and conditions, that is to say :

Article I. Such consolidation shall be effected by uniting or merging the stock, property and franchises of the party of the first part with and into the stock, property and franchises of the said The Yazoo and Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new, distinct, corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective.

Article II. The corporate name of the said consolidated company shall be the Yazoo and Mississippi Valley Railroad Company.

Article III. The capital stock of the said consolidated company shall be fifteen million dollars, to be divided into one hundred and fifty thousand shares of one hundred dollars each; but the said corporation may at any time increase or diminish the amount of its capital stock according to law.

Article IV. Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him at all stockholders' meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and in case the consolidated company shall determine to issue *merging the*
53 *stock, property and franchises of the party of the* now outstanding shares of each of the constituent companies; and the remainder of the capital stock of the consolidated company shall be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company.

Article V. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action and property and assets of every kind, nature or description, belonging to either of the parties hereto, shall be vested in, and become the property of, the said consolidated company, without any further act, deed, conveyance or assurance being required in the premises.

Article VI. The affairs of the consolidated company shall be managed by a board of directors, which shall consist of such a number of members, not less than five, as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the State of Mississippi, one of Tennessee and one of Louisiana. The members shall be divided into three equal classes as nearly as practicable. Successors, to serve for the term of three years, shall be chosen for those who belong to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected; for those who belong

to the second class, at the next annual meeting; and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the board, caused otherwise than by expiration of the term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next regular election of directors by the stockholders.

The first board of directors shall be composed of the following members, divided into three classes as follows?

First class. Stuyvesant Fish, Adolphe Schreiber, W. C. Craig, Charles A. Peabody, Jr.

Second class. John W. Auchincloss, Walther Luttgen, Edward H. Harriman, J. T. Harrahan.

Third class. S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling.

54 Article VII. The board of directors of said consolidated company shall choose one of their number president, whose term of office shall be one year, or until his successor shall be chosen and qualified. They may also appoint such other officers and agents as they may deem necessary from time to time, and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said board shall also have power to appoint an executive committee, of whom the president shall be one *ex officio*, who shall possess and exercise all the powers and duties of the board of directors when the board is not in session. Until otherwise ordered, the corporate seal of the said consolidated company shall be that of the Yazoo and Mississippi Valley Railroad Company.

Article VIII. The said consolidated company shall be, and the same is hereby authorized and empowered, in such manner and upon such conditions as are permitted by law, to issue its bonds and to secure the same, as well as all bonds heretofore issued by either of the constituent companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust upon all or any of its railroads, rights, franchises and property, real or personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is effected or may be thereafter acquired; and may also exercise any and every other corporate right or power now vested in, or which might have been heretofore lawfully exercised by, either of said constituent companies.

Article IX. Until otherwise ordered the domicile of the said corporation, under the laws of the State of Louisiana, shall be in the parish of Orleans; and, under the laws of the State of Mississippi, in the city of Jackson, in Hinds county; and the general domicile of the corporation shall be at Memphis, in the State of Tennessee.

Article X. The provisions of these articles shall be obligatory upon the successors and assigns of the respective parties hereto and

shall become operative and of force from and after the 25th day of October, A. D. 1892.

In witness whereof, the parties hereto have caused their corporate names to be hereto subscribed by their respective presidents,
55 and their corporate seals to be affixed and attested by their respective secretaries, on the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By RICHARD T. WILSON, *President.*

[SEAL.]
Attest: CHARLES H. BOSHER, *Secretary.*

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
By STUYVESANT FISH, *President.*

[SEAL.]
Attest: ALEXANDER G. HACKSTAFF, *Secretary.*

As to the Louisville, New Orleans and Texas Railway Company, Witness:

S. TOWNSEND.
J. F. VAN NAME.
GEORGE H. TAYLOR.

As to the Yazoo and Mississippi Valley Railroad Company, Witness:

W. E. RUTTAN,
CHAS. H. WENMAN, AND
GEORGE H. TAYLOR.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that, on this twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me personally known and known to me to be such officers of said company, who, being by me severally duly sworn, did depose and say: That the said Richard T. Wilson was the president and the said Charles H. Bosher was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by like order as president and secretary of said company respectively.

56 In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Tennessee in New York
[SEAL.] *and Notary Public N. Y. County.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that, on this twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me personally known and known to me to be such officers of said company, who being by me severally duly sworn, did depose and say: That the said Richard T. Wilson was the president and the said Charles H. Bosher was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Mississippi in New York
[SEAL.] *and Notary Public N. Y. County.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville,
57 New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me personally known, and known to me to be such officers of said company, who, being by me severally duly sworn, did depose and say: That the said Richard T. Wilson was the president, and the said Charles H. Bosher was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company, and that they, the said Richard T. Wilson and Charles H. Bosher,

signed their names thereto by like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Louisiana in New York
[SEAL.] *and Notary Public N. Y. County.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that, on the twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company, who being by me severally duly sworn, did depose and say: That he, the said Stuyvesant Fish, was the president, and that he, the said Alexander G. Hackstaff, was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Tennessee in New York
[SEAL.] *and Notary Public N. Y. County.*

58 STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that, on the twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company, who being by me severally duly sworn, did depose and say: That he, the said Stuyvesant Fish, was the president, and that he, the said Alexander G. Hackstaff, was the secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed

thereto by order of the board of directors of said company; and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and secretary of said company, respectively.

In witness whereof, I have hereunto set my hand and affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYLOR,
Commissioner for Mississippi in New York,
[SEAL.] *and Notary Public N. Y. County.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that, on the twenty-fourth day of October, A. D. 1892, before me, George H. Taylor, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana in and for the State of New York, residing in said city and county of New York, personally appeared Stuyvesant Fish, president of the Yazoo and Mississippi Valley Railroad Company, and Alexander G. Hackstaff, secretary of the same company, to me personally known and known to me to be such officers of said company, who being by me severally duly sworn, did depose and say: That he, the said Stuyvesant Fish, was the president, and that he, the said Alexander G. Hackstaff, was the secretary of the said company; that they know the
59 corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal, and that it was so affixed thereto by order of the board of directors of said company; and that they, the said Stuyvesant Fish and Alexander G. Hackstaff, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof, I have hereunto set my hand affixed my official seals this twenty-fourth day of October, A. D. 1892.

[SEAL.] GEORGE H. TAYOR,
Commissioner for Louisiana in New York,
[SEAL.] *and Notary Public N. Y. County.*

EXHIBIT D TO O. BILL.

JACKSON, MISSISSIPPI, *Dec.* 31, 1897.

To the railroad commissioners of the State of Mississippi, Jackson, Mississippi.

GENTLEMEN: Please take notice that the following-described property in said State, viz: the Natchez, Jackson & Columbus Railroad Company and the Louisville, New Orleans and Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, the property of said companies being that railroad between the cities of Natchez and Jackson in said State, known as the Natchez, Jackson & Columbus railroad, has escaped taxation during the years 1886, 1887, 1888, 1889, 1890, and 1891, because of not being assessed heretofore:

By virtue of an act of the legislature of said State, approved February 7th, 1894, entitled "An act to provide for the election of a State revenue agent, to prescribe his powers and duties and to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, chapter 126 of the Annot-ed Code of 1892," I now hereby respectfully notify you, within ten days hereafter, to make the proper assessment of said property by way of an additional assessment, or at as early a date as possible, consistent with the requirements of the law, on the rolls or tax-list in your hands, and to give ten days', or longer, notice in writing, to the Yazoo & Mississippi Valley Railroad Company, and the Natchez, Jackson & Columbus Railroad Company, whose company and property is so assessed, and herein fail not under the penalties imposed by said act.

Witness my signature this December 31st, 1897.

WIRT ADAMS,
State Revenue Agent.

60 EXHIBIT E TO O. BILL.

An indenture made the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, the party of the first part has been formed by the consolidation under the laws of the States of Tennessee, Mississippi and Louisiana, of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part and its successors are about to execute and issue, from time to time, but with the limitations hereinafter prescribed in respect to the aggregate amount thereof which may at any time be outstanding, which amount is not in any case to exceed, at the par or face value of such bonds, the sum of sixteen million nine hundred thousand dollars, first-mortgage bonds for one thousand dollars each of the general form and tenor following, to wit:

UNITED STATES OF AMERICA.

Louisville, New Orleans and Texas Railway Company.

No. —. *First-mortgage Gold Bond.* No. —.

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof, or, if registered to the registered holder hereof, the sum of one thousand dollars on the first day of September, 1934, and, on presentation and surrender at or after maturity of the respective interest warrants hereunto annexed, to pay to the person presenting the same, or, if this bond is registered and the interest warrants appertaining thereto
61 canceled, to pay to the registered holder hereof, interest on such principal sum at the rate of four per centum per annum, semi-annually, on or after the first day of March and September in each year, such payments of principal and interest to be made at the office or agency of said company in the city of New York, in United States gold coin.

This is one of the first-mortgage bonds of said railway company, secured by a deed of trust to the Union Trust Company of New York, trustee, dated August 25, 1886.

None of said bonds are to be in anywise binding or obligatory unless authenticated by a certificate indorsed thereon, signed by said trustee or its successor or successors in said trust.

This bond may at any time, upon production thereof to said railway company and proper indorsement being made thereon, and either with or without the surrender to said railway company for cancellation of all unpaid interest warrants appertaining thereto, be registered upon the books of the company in the name of the holder thereof, and thereupon its transferability by delivery will cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer duly made upon said books.

In witness whereof, the said railway company has caused these presents to be signed by its president, and its corporate seal to be affixed thereto and attested by its secretary, this first day of September, one thousand eight hundred and eighty-six.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,

By —— ——, *President.*

[SEAL.]

Attest: —— ——, *Secretary.*

And whereas, the general form of the several interest warrants to be annexed to such bonds (each of which interest warrants is to bear the engraved signature of the treasurer of the railway company) is to be as follows, viz:

(*Form of Interest Warrant.*)

Interest warrant for twenty dollars gold, being semi-annual interest maturing on the first day of — upon the Louisville, New Orleans and Texas Railway Company's first-mortgage bond No. —.

$20. —— ——, *Treasurer.*

And whereas, all of the said bonds are to be equally secured by mortgage and hypothecation of the railways and railway lines of the party of the first part, and its successors constructed and
62 to be constructed or acquired until the length of such railways shall amount, in the aggregate, to eight hundred miles, and of all their appurtenances, and the franchises relating or pertaining thereto.

Now therefore this indenture witnesseth, that the party of the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of such bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed. and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part, and its successors, whether constructed or to be constructed or acquired, until the length of such railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operation of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also, all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever, in trust, nevertheless, for the security and benefit of all and every the persons or bodies corporate who or which shall be or at any time become the holder or holders of any such bonds, or the interest warrants appertaining thereto without preference to the holder of any of said bonds or interest warrants over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiation of the same.

63 Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said bonds and interest warrants, when and as the same shall

become due and payable, the principal and interest moneys secured hereby, according to the terms, provisions and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in the payment of the principal or interest of the said bonds, or some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises, with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof, and the trustee or trustees hereunder shall have full power in its or their discretion, upon written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any lands or other property of any description which in its or their judgment shall not be necessary for, or for use in connection with, said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect, but any lands or other property which may be acquired for permanent use in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon request of the trustee or trustees hereunder shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of said bonds, or either of them, and if such default shall continue for the period of six months, then, and in that case, the party of the second part, or its successors in the trust, are hereby authorized and empowered, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so
64 to be, and in person, or by one or more agents to operate the said railway to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for, and to make, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions

and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default, in the order of their maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal — interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall continue for the period of six months, then, and in that case, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to, cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein or thereto, to be sold at public auction in the city of New York, in the State of New York, or the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months, in two newspapers published in said city of New York and two newspapers published in said city of Memphis, and giving such other
65 notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part or its successors making such sale, and it and they are hereby authorized and empowered, as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part, and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of the

trustee or trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of such sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in inforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services in the premises; and also any balance which may be due to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as
66 may be necessary to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due. And in case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and with preference of the holder of any one bond or interest warrant over any of the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared, agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges and property, under and in virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings in any court or courts of competent jurisdiction to foreclose this mortgage or inforce the rights, liens and

securities of the trustee or trustees and the bondholders thereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises rights privileges and property hereby granted or conveyed or intended so to be sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding bonds, issued under or entitled to the benefit of the security of this mortgage, and for the inforcement of the rights, liens and securities of the trustee or trustees and the bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises and properties, rights and franchises, under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale,
shall be applicable and applied as far and as nearly as may
67 be, in case of such judicial sale being made under the order or decree of the court.

And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof in inforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers, as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part and its successors in the trust, and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of ~~the first part~~, its successors and assigns, shall and will at any time and from time to time hereafter, upon request, made, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assume and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described, and hereby intended to be granted, and so as to render the same, and especially such portions thereof as shall be

hereafter acquired by the said party of the first part, or its successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided, covenanted, declared and agreed that the party of the second part and its successors in the trust hereby created are forthwith, upon the request of the party of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to the amount of ten million dollars, and thereafter from time to time to
68 authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, such bonds, to amounts which shall aggregate twenty thousand dollars for each mile of constructed railway (not included in the main line of railway of the party of the first part from Memphis to New Orleans), which may be certified to the party of the second part or its successors in this trust, as hereinafter provided, to be then owned by the party of the first part, or its successors, and mortgaged hereby, or by indenture of mortgage or deed of trust supplemental hereto constituting a first mortgage thereon, until the length of such railways, including such main line, shall amount in the aggregate to eight hundred miles: and that the certificate of the president of said party of the first part or its successors to the facts entitling the party of the first part or its successors to receive such bonds under the foregoing clause hereof, shall be sufficient evidence of such facts and shall fully protect the said party of the second part or its successors in respect to the authentication, certification and delivery of said bonds; but it is expressly provided, declared, covenanted and agreed that the said party of the second part and its successors in the trust created hereby shall not, in any event in addition to the bonds to the amouut of ten million dollars to be forthwith issued hereunder in respect of main line, authenticate or certify, as issued hereunder, bonds in excess of twenty thousand dollars for each mile of railway so certified to be constructed, owned and mortgaged but not to be included in such main line. Provided, however, that nothing herein contained shall prevent the party of the second part and its successors from authenticating, certifying and delivering to said party of the first part, its successors or assigns, bonds in excess of the limits above prescribed (but not in any case exceeding in the aggregate the amount at their par or face value of sixteen million nine hundred thousand dollars, in case the proceeds of the sale of such bonds issued in excess of such limits shall simultaneously with the delivery of such bonds to the party of the first part, its successors or assigns, to be deposited with the trustee or trustees hereunder, to be delivered to the party of the first part, its successors or assigns, only from time to time, as and when, under the foregoing provisions hereof, it or they would have become entitled to receive the bonds represented by such deposited proceeds, and until such delivery of such proceeds to said party of the first part, its successors or assigns,

the same shall be held by the said trustee or trustees, as further collateral security to all the bonds outstanding hereunder.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees,
69 by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and duties of the trustee or trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties, according to the intent above expressed.

And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglects of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part for that purpose shall become necessary. The party of the second part is to be entitled to compensation for services in the execution of this trust.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

[Corporate Seal.]

Attest: C. H. BOSHER, *Secretary.*

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *Pres't.*

[Corporate Seal.]

Attest: JAS. H. OGILVIE, *Sec'ty P. T.*

70 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas R'y Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, who, being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof I have hereunto set my hand and affixed my official seal this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared
71 Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known and known to me to be such officers of the said company, who, being by me severally duly sworn, did depose and say: That he, said Edward King, resides in the city of New York, in the State of New York; and that he, said James H. Ogilvie, resides in said city of New York, in the State of New York; that he, said Edward King, is the

president, and he, said James H. Ogilvie, is the secretary *pro tem.*, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that they, the said Edward King and James H. Ogilvie, signed their names thereto by the like authority as president and secretary *pro tem.* of said company respectively.

In witness whereof I have hereunto set my hand and affixed my official seal this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi, in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary, they signed and delivered the foregoing instrument and affixed thereto the corporate seal of said company on the day and year therein mentioned.

In witness whereof I have hereunto set my hand and
72 affixed my official seal this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner for the State of Mississippi in and for the State of New

York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of said company, who acknowledged to me that in pursuance of authority in them vested by the board of trustees of said company, and as such president and secretary *pro tem.* they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Mississippi.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared
Richard Thornton Wilson, president of the Louisville, New
73 Orleans and Texas Railway Company, and Charles H. Bosher,
secretary of the same company, to me respectively personally known and known to me to be such officers of the said company, and to be the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me severally duly sworn, did depose and say: That he, said Richard Thornton Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard Thornton Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard Thornton Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively, and thereupon acknowledged that they had signed, sealed and delivered such instrument as the voluntary act and deed of said company, and as their own voluntary act and deed, for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my

official seal, this 25th day of August, one thousand eight hundred and eighty-six.

R. T. WILSON.
C. H. BOSHER.

Witnesses:
CHARLES H. TWEED.
J. F. C. GROW.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, per-
74 sonally appeared Edward King, president of the Union Trust Company of New York, to me personally known, and known to be the president of the said company, and to be the same person described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me duly sworn, did depose and say: That he resides in the city of New York, in the State of New York, and is the president of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that he signed his name thereto by the like authority as president of said company, and the said King thereupon acknowledged that he had signed, sealed and delivered the said instrument as the voluntary act and deed of said company, and as his own voluntary act and deed for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of August, one thousand eight hundred and eighty-six.

EDW'D KING.

Witnesses:
R. C. McGILL.
A. H. ALVORD.

]NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Louisiana.

[COMMISSIONER'S SEAL.]

Exhibit F to O. Bill.

An indenture made the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, by and between the Louisville, New Orleans and Texas Railway Company, a corporation created, organized, and existing under the laws of the States of Tennessee, Mississippi, and Louisiana, party of the first part, and the Union Trust Company of New York, a corporation created, organized, and existing under the laws of the State of New York, party of the second part.

Whereas, the party of the first part has been formed by the consolidation, under the laws of the State of Tennessee, Mississippi and Louisiana, of the Tennessee Southern Railroad Company a corporation created and existing under the laws of the State of Tennessee,
75 the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis, in the State of Tennessee, to New Orleans, in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part and its successors are about to execute and issue, to the amounts hereinafter prescribed on that behalf, second-mortgage bonds for one thousand dollars each, of the general form and tenor following, to wit:

United States of America.

Louisville, New Orleans and Texas Railway Company.

No. —. *Second-mortgage Bonds.*

The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay, at its agency in the city of New York, to the bearer hereof, or, if registered, to the registered owner hereof, one thousand dollars, on the first day of September, one thousand nine hundred and thirty-four, and also in the meantime, on the first day of March and September in each year after the year 1888, to pay, at such agency on presentation of this bond for indorsement of such payment thereon, such interest on such principal sum, not exceeding five per centum per annum payable semi-annually, from the 1st day of September, 1888, and interest on interest in arrears, as the net earnings of said railway company shall suffice to pay on the entire issue of which this bond is one, after making such deductions from the said net earnings as are provided for in the mortgage or deed of trust securing the same hereinafter referred to.

This bond is one of a series of second-mortgage bonds of like tenor and amount numbered consecutively from 1 upward, which are secured by a mortgage or deed of trust made by the said railway

company to the United Trust Company of New York, as trustee, dated August 26, 1886, and are subordinate in lien to the first-mortgage four per cent. gold bonds of said railway company or its successors, issued or to be issued under indenture of mortgage or deed of trust, dated August 25, 1886. Each successive holder of this bond accepts the same subject to the terms, conditions and limitations expressed in said mortgage or deed of trust securing the same, and waives all right of action hereon except in accordance therewith.

76 The interest on this bond shall be payable only out of the net earnings of the said railway company, after making the deductions therefrom provided for in the said mortgage or deed of trust securing the same, and shall not be due at any time during the currency of this bond, until the amount payable in respect thereof shall have been determined and declared by the board of directors of said railway company.

But such interest shall be cumulative, and in case less than two and a half per centum be paid in any half year, the unpaid interest, with interest on such unpaid interest at the rate of five per centum per annum, shall be carried forward to the credit of this bond, for subsequent payment as such net earnings after such deductions shall suffice therefor, or at the maturity of the bond. All arrears of such interest, with the accrued interest thereon (so far as the same shall not have been previously paid), shall be paid with the principal of this bond, on the 1st day of September, 1934, and no dividend shall be paid upon the stock of the company or its income bonds until interest hereon, calculated at the rate of five per centum per annum from the 1st day of September, 1888, and payable semi-annually, together with the accrued interest on any arrears of such interest shall have been fully paid.

It is further provided that the railway company or its successors may, at its or their option, at any time after two years from the date hereof, pay and extinguish such whole issue of second-mortgage bonds upon giving thirty days' notice in such manner as is prescribed in such mortgage or deed of trust securing the same, of its election to pay off such bonds at a prescribed date and place, and in case the said company shall at such prescribed date and place pay or be ready to pay the face of said bonds with five per cent premium thereon, and such interest as up to that date may have been earned and become due on said bonds according to the terms thereof, and may remain unpaid, the said bonds shall thereupon cease to bear interest.

This bond shall pass by delivery unless registered. After registration, certified hereon by the company's transfer agent, no transfer, except upon the company's books, shall be valid, unless the last registration shall have been to bearer.

This bond shall not be valid or obligatory until the certificate authenticating the same and indorsed hereon shall have been signed by the trustee hereunder.

In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and attested by its secretary and

these presents to be assigned by its president, the first day of September, one thousand eight hundred and eighty-six.

77 And whereas, all of the said second-mortgage bonds are to be equally secured by mortgage and hypothecation of the railways and railway lines of the party of the first part and its successors, constructed or to be constructed or acquired until the length of such railways shall amount, in the aggregate, to eight hundred miles, and of all their appurtenances, and the franchises relating or pertaining thereto.

Now therefore this indenture witnesseth, that the party of the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of such second-mortgage bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part and its successors, whether constructed or to be constructed or acquired, until the length of such railways shall amount in the aggregate to eight hundred miles, and all their appurtenances, including therein all lands and rights of way, superstructure, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, buildings, erections and structures necessary to the operations of said railways or said railway lines, and all and singular the rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also, all rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also, the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever, in trust, nevertheless for the security and benefit of all and every the persons or bodies corporate who or which shall be or at any time become the holder or holders of any such second-mortgage
78 bonds, without preference to the holder of any of the said bonds over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiating of the same, but subject at all times to the lien of the mortgage or deed of trust from said party of the first part to the party of the second part,

dated Aug. 25, 1886, securing the first-mortgage four per cent. gold bonds of said party of the first part or its successors, as thereby appears.

Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns shall well and truly pay or cause to be paid to the holders of the said second-mortgage bonds when and as the same shall become due and payable, the principal and interest moneys secured hereby, according to the terms, provisions and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in payment of the principal or interest of the said bonds, of some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises with their appurtenance-, and all and singular the rights and franchises hereinbefore described, and to receive, take and use the tolls, income, earnings and profits thereof, and the trustee or trustees hereunder shall have full power, in its or their discretion, upon written request of the party of the first part, its successors or assigns, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any land or other property of any description which in its or their judgment shall not be necessary for, or for use in connection with, said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances *are* necessary to carry the same into effect, but any lands or other property which may be acquired for permanent use in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon the request of the trustee or trustees hereunder shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of said bonds, or either of them, and if such default shall continue for the period of six months, then, and in that case, the party of
79 the second part, or its successors in the trust, are hereby authorized and empowered, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, and in person, or by one or more agents to operate the said railways, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for,

and to take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and for all taxes and assessments which shall be levied or assessed thereon, and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the same may be or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest remaining in default, in the order of its maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest *pro rata* without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default shall continue for the period of six months, then, and in that case, at the request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, the said party of the second part, or its successors in the said trust, may, and it and they are hereby authorized and empowered to, cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, with their appurtenances, and all the benefit — equity of redemption of the said party of the first part, and its successors and as-
80 signs therein or thereto, to be sold at public auction in the city of New York, in the State of New York, or the city of Memphis, in the State of Tennessee, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months, in two newspapers published in said city of New York, and two newspapers published in said city of Memphis, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part or its successors making such sale, and it and they are hereby authorized and empowered, as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate, right, title and interest of said party of the first part, and i-s succes-

sors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be a perpetual bar, both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of the trustee or trustees who shall make the sale hereinbefore authorized shall be sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of said sale, or of any sale which shall under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own
81 services in the premises; and also any balance which may be due to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due; and in case of a deficiency of such proceeds to pay in full the amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amount owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any one bond over any of the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite

proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and by virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to foreclose this mortgage or enforce the rights, liens and securities of the trustee or trustees and the bondholders thereunder; and thereupon said trustee or trustees shall be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the principal and interest due or owing upon the then outstanding second-mortgage bonds, issued under or entitled to the benefit of the security of this mortgage, and for the enforcements of the rights, liens and securities of the trustee or trustees and the bondholders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like
82 manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises and properties, rights and franchises, under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court.

And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof in inforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use towards the payment of such purchase-money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purchase, at such sum as would be payable out of the net proceeds of such sale to such purchaser or purchasers, as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon due apportionment of and concerning such net proceeds.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part, and its successors in the trust, and to and with respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns, shall and will at any time and from time to time hereafter, upon

request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents, and to assure and confirm to the said party of the second part, or its successors, all and singular the property and estate, real and personal, hereinbefore described, and hereby intended to be granted and so far as to render the same, and especially such portions thereof as shall be hereafter acquired by the said party of the first part, or its successors, available for the security and satisfaction of the said bonds, according to the intent and purpose herein expressed.

And it is hereby further provided, covenanted, declared and agreed that the party of the second part and its successors in the trust hereby created are forthwith, upon the request of the party
83 of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to the amount of seven million eight hundred and ninety-nine thousand dollars, and that hereafter, from time to time, when and as it shall be certified to the party of the second part or its successors in this trust as hereinafter provided that any additional railway, not included in the present main line of the railway of the party of the first part from Memphis to New Orleans, has been constructed or acquired by said party of the first part or its successors, and has become subject to this mortgage or to any supplemental mortgage subjecting the same to a lien in favor of the second mortgage bonds issued hereunder, the said party of the second part and its successors in the trust hereby and as it shall be certified to the party of the second part or its successors, to authenticate and certify as issued hereunder and deliver to the party of the first part or its successors such additional amounts of such second-mortgage bonds (bearing interest to the like extent with the other second-mortgage bonds of this issue then outstanding), as shall justly represent the capitalization into said bonds, of the difference between five per cent. interest, payable semi-annually, and four per cent. interest payable semi-annually, for the remainder of the term of said bonds, upon twenty thousand dollars for each mile of such additional road. Provided that no such additional bonds shall be issued hereunder in respect of such additional railroad when the length of such railroads in respect of which such bonds shall have been issued together with the main line above referred to, shall amount in the aggregate to eight hundred miles; and that the certificate of the president of said party of the first part or its successors to the facts, entitling the party of the first part or its successors to receive such additional bonds, under the foregoing clause hereof, shall be sufficient evidence of such facts, and shall fully protect the said party of the second part or its successors in respect to the authentication, certification and delivery of such bonds.

It is hereby further provided, covenanted, declared and agreed that the amount which shall be appropriated and applied to or towards the payment of interest on such second-mortgage bonds

each six months during the currency of such bonds, shall be ascertained by the board of directors of the party of the first part of its successors, by deducting from the earnings and income of said company from such railways, the expenses of operating said railways and the keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals and acquisitions, and of providing and keeping
84 up suitable equipment and the expenses of conducting the said company's business and affairs, and maintaining its corporate organization, and the interest payable each six months upon the first-mortgaged four per cent. gold bonds of the said railway company or its successors, issued under or secured by the indenture of mortgage or deed of trust from said railway company to the Union Trust Company of New York, dated August 25, 1886, and that such amounts so remaining after such deductings shall be distributed and applied *pro rata* among the holders or registered owners of the second-mortgage bonds secured hereby from time to time outstanding. Provided, however, that the amounts so from time to time distributed, shall not in the aggregate exceed five per cent. per annum, from the first day of September, 1888, payable semi-annually, and interest which may have accrued upon the arrears of interest remaining at any time, or from time to time, unpaid.

And it is further provided, covenanted, declared and agreed that the said party of the first part or its successors may at its or their option at any time after two years from September 1, 1886, pay and extinguish such whole issue of second-mortgage bonds secured by this indenture upon giving 30 days' notice by publication twice a week in two newspapers of good circulation in the city of New York, of its election to pay off the same at a prescribed date and place, and in case the said company shall at such prescribed date and place pay or be ready to pay the face of said bonds with five per cent. premium thereon, and such interest as up to that date may have been earned and become due on said bonds according to the terms thereof and may remain unpaid, the said bonds shall thereupon cease to bear interest.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustee or new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their appointment, and without any further act, deed or conveyance, be-

come and be vested with all of the estates, trusts, rights, powers
85 and duties of the trustee or trustees in whose place it, he or
they shall have been appointed; but nevertheless, the respective parties thereto, and their respective successors and assigns, shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees such estates, trusts, rights, powers and duties, according to the intent above expressed.

And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed, that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for, and that no other liability or responsibility shall, under any circumstances, be borne by or attach to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part for that purpose shall become necessary. The party of the second part is to be entitled to compensation for services in the execution of this trust.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries, and these presents to be signed by their respective presidents the day and year first above written.

LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY COMPANY,
By R. T. WILSON, *President.*

[CORPORATE SEAL.]
Attest: C. H. BOSHER, *Secretary.*

UNION TRUST COMPANY OF NEW YORK,
By EDW'D KING, *President.*

[CORPORATE SEAL.]
Attest: JAS. H. OGILVIE, *Secretary P. T.*

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of
86 New York, residing in said city and county of New York,
personally appeared Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said

company, who being by me severally duly sworn, did depose and say: That he, said Richard T. Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York; that he, said Richard T. Wilson, is the president, and he, said Charles H. Bosher, is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by order of the board of directors of the said company, and that they, the said Richard T. Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively.

In witness whereof I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York.
Commissioner for the State of Tennessee.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Tennessee, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of the said company, who being by me severally duly sworn, did depose and say: That he, said Edward King, resides in the city of New York, in the State of New York; and that he said James H. Ogilvie, resides in said city of New York, in the State of New York; that he, said Edward King, is the president, and he, said James H. Ogilvie, is the secretary *pro tem.* of the said company; that they know the corporate seal of said company; that the seal affixed
87 to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that they, the said Edward King and James H. Ogilvie, signed their names thereto by the like authority as president and secretary *pro tem.* of said company, respectively.

In witness whereof I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York and commissioner for the State of Mississippi, in and for the State of New York residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, and State of New York and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, and James H. Ogilvie, secretary *pro tem.* of the same company, to me respectively personally known, and known to me to be such officers of said company, who acknowledged to me that in pursuance of authority in them vested by the board of trustees of said company, and as such president and secretary, they signed and delivered the foregoing instrument and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.

[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Richard Thornton Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Chas. H. Bosher, secretary of the same company, to me respectively, personally known and known to me to be such officers of the said company, and to be the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are hereto subscribed as such, who being by me severally duly sworn, did depose and say: That he, said Richard Thornton Wilson, resides in the city of New York, in the State of New York, and that he, said Charles H. Bosher, resides in the city of New York, in the State of New York: that he, said Richard Thornton Wilson is the president, and he, said Charles H. Bosher is the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto
89 by order of the board of directors of the said company, and that they, the said Richard Thornton Wilson and Charles H. Bosher, signed their names thereto by the like order as president and secretary of said company respectively, and thereupon acknowledged that they had signed, sealed and delivered such instrument as the voluntary act and deed of said company, and as their own voluntary act and deed, for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand, and affixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

R. T. WILSON.
C. H. BOSHER.

DANIEL OAKEY,
E. MORA DAVISON,
Witnesses.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner for the State of Tennessee.
[COMMISSIONER'S SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered, that on this twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public in

and for the city and county of New York, State of New York, and commissioner for the State of Louisiana, in and for the State of New York, residing in said city and county of New York, personally appeared Edward King, president of the Union Trust Company of New York, to me personally known, and known to me to be the president of the said company, and to be the same persons described in and who executed the foregoing instrument in my presence and in that of the two witnesses whose names are thereto subscribed as such, who being by me duly sworn, did depose and say: That he resides in the city of New York, in the State of New York, and is the president of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was so affixed thereto by authority of the board of trustees of the said company, and that he signed his name thereto by the like authority as president of said company, and the said King thereupon acknowledged that he had signed, sealed, and delivered the said instrument as the voluntary act and deed of said company, and as his own voluntary act and deed for the considerations, uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand, and af-
90 fixed my official seal this 26th day of August, one thousand eight hundred and eighty-six.

EDW'D KING.

E. MORA DAVIDSON,
JAS. H. OGILVIE,
Witnesses.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York, Commissioner for the State of Louisiana.

[COMMISSIONER'S SEAL.]

EXHIBIT G TO O. BILL.

Deed of Trust for Land-grant Income Bonds.

This indenture, made the twenty-seventh day of August, eighteen hundred and eighty-six, between the Louisville, New Orleans and Texas Railway Company, a corporation created and organized under the laws of the States of Tennessee, Mississippi and Louisiana, party of the first part, and Edward H. Pardee, of the city of New York in the State of New York, and Albert Crolius, of the city of Brooklyn in the State of New York, as trustees, as hereinafter mentioned, parties of the second part.

Whereas, the party of the first part has been formed by the consolidation, under the laws of the States of Tennessee, Mississippi and Louisiana of the Tennessee Southern Railroad Company, a corporation created and existing under the laws of the State of Tennessee, the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and the Memphis and Vicksburg Railroad

Company, corporations created and existing under the laws of the State of Mississippi, and the New Orleans and Mississippi Valley Railroad Company, a corporation created and existing under the laws of the State of Louisiana, and is the owner of a line of railway extending from Memphis in the State of Tennessee, to New Orleans in the State of Louisiana, and is authorized to construct branches thereto.

And whereas, the party of the first part, in accordance with the authority vested in it on that behalf, is about to execute and issue from time to time (but with the limitation hereinafter prescribed in respect to the aggregate amount thereof which may at any time be outstanding), its land-grant income bonds for one thousand dollars each, of the general form and tenor following, to wit:

No. —. $1,000.

Louisville, New Orleans and Texas Railway Company Land-grant Income Bond.

91 The Louisville, New Orleans and Texas Railway Company, for value received, promises to pay to the bearer hereof the sum of one thousand dollars at its agency in the city of New York fifty years after date, and further promises to pay the bearer hereof in the meantime, annually, on the first day of November in each year, at its agency in the city of New York, on presentation of this bond for endorsement of such payment thereon, such interest on such principal sum, (not exceeding, however, six per centum per annum), as the net earnings and income of said railway company from its railways in each current year ending on the first day of July next preceding the day above fixed for the payment of the annual interest hereon shall suffice to pay upon all the bonds of this issue outstanding on such first day of July after the first paying from the earnings and income of said company from such railways the expenses of operating said railways, and of keeping up and maintaining the same, with their appurtenances, and of all improvements, additions, betterments, renewals and acquisitions, and of providing and keeping up suitable equipment, and the expenses of conducting said company's business and affairs, and maintaining its corporate organization, and after likewise paying from said earnings and income the interest payable from time to time upon such other bonds of said company or its successors as shall be from time to time outstanding, and such amounts as may be prescribed to be paid to or towards sinking funds for the redemption thereof.

And if in any year the amount as ascertained and determined to be applicable to the payment of such annual interest on the bonds of this issue shall not be sufficient for the full payment of interest at the rate of six per centum per annum thereon, the amount of such deficiency, whether partial or total, shall not be accumulative, nor be made up out of any surplus income of subsequent years, but shall be absolutely waived, relinquished and discharged.

This bond is one of a series of bonds of said railway company for one thousand dollars each, numbered consecutively from 1 (one) upwards, issued and to be issued at a rate not exceeding twenty thousand dollars per mile of railroad constructed ready for operation, all of which bonds are equally secured by a certain indenture of mortgage or deed of trust, bearing date the 27th day of August, one thousand eight hundred and eighty-six, executed by the said railway company to Edward H. Pardee and Albert Crolius, as trustees, conveying upon the terms and conditions therein expressed, all such lands of said railway company situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar,
92 Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be acquired for the use of said railway company or its successors in the construction or operation of its or their railroads or branches.

This bond shall not become obligatory unless the certificate endorsed hereon is signed by the trustees under the indenture of mortgage or deed of trust securing the same.

In witness whereof, the said Louisville, New Orleans and Texas Railway Company has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary, the first day of September, in the year of our Lord one thousand eight hundred and eighty-six.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY.

By —— ——, *President.*

—— ——, *Secretary.*

And whereas, the said party of the first part desires to secure the due payment of said bonds by this mortgage.

Now, therefore, this indenture witnesseth: That the said party of the first part, in consideration of the premises, and for the purpose of securing the due payment of the aforesaid bonds, in accordance with the terms, provisions and conditions thereof, and in further consideration of one dollar to the said party of the first part in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, released, conveyed and confirmed and by these presents doth grant, bargain, sell, assign, release, convey and confirm unto the said Edward H. Pardee and Albert Crolius, trustees as aforesaid, parties of the second part, and their successors or successor in said trust, all such lands of said party of the first part situated in the counties of De Soto, Tunica, Quitman, Coahoma, Bolivar, Washington, Issaquena, Sharkey, Warren and Tate, in the State of Mississippi, as are not and shall not be required for the use of said party of the first part, or its successors, in the construction or operation of its or their railroads or branches, together, with the rents, issues and profits thereof, and also the deferred payments, still remaining unpaid, on account of the purchase price of the like lands sold by said party of the first part since the 25th day of August, 1885, and also (subject to the lien of the first mortgage from

the party of the first part to the Metropolitan Trust Company of the City of New York, dated September 18, 1884; and the first mortgage to the Union Trust Company of New York, dated August 25, 1886; and the second mortgage to the Union Trust Company of New York, dated August 26, 1886), all the rents, issues, tolls, incomes, earnings and profits of its railways or railway lines,
93 which the said party of the first part now possess, or is entitled to, or may become possessed of or entitled to.

To have and to hold, unto the said parties of the second part, and their successors or successor, in the said trust, but in trust for and for the use, benefit and security of, all and singular the persons and corporations who or which shall, from time to time, be or become lawful owners or holders of any of said land-grant income bonds, and for securing the due payment of such bonds respectively, with *pro rata* equality, without preference or priority of any of such bondholders over any of the others.

And the party of the first part doth declare and covenant that the lands herein conveyed are free from all incumbrance whatsoever, except the mortgage or deed of trust between the parties hereto, dated September 18, 1884, and the supplemental deed of trust between the same parties, dated August 25, 1885, and that it has not caused or suffered to be placed thereon any other lien or incumbrance prior or paramount to the lien of this mortgage.

Provided always, nevertheless, and these presents are upon the express condition, that if the said party of the first part, its successors or assigns, do and shall well and truly pay the principal and interest of said land-grant income bonds when and as the same shall become due and payable, in accordance with the terms, provisions and conditions thereof, then these presents and the estates, rights, and interests thereby granted or conveyed shall cease and determine, and become null and void.

And provided further, and it is an express provision and condition of this indenture, that the party of the first part, or its successors, notwithstanding the execution of these presents, shall be permitted at any time, and from time to time, by means of its land department, or otherwise, to lease, sell and dispose of the lands mortgaged hereby, or any part thereof, upon such terms as may be satisfactory to it, and in order that it may be enabled to give title thereto free and discharged from this mortgage, it is an express provision and condition of this indenture, that the trustees hereunder shall, at all times, upon payment to them of the purchase-money of such sales, or the transfer to them of the evidence of indebtedness given therefor by the purchaser, together with such security, if any, as may be taken therefor, execute full releases of the lien hereof, either by indorsement on the deeds to such purchasers, or by separate deeds or releases — may be required of them.

And it is further agreed, that it shall be the duty of the parties of the second part, or their successors, to apply the gross receipts from such sales or disposition thereof, and collections of such deferred payments above mentioned, as follows:

94 First. To the payment of taxes and assessments accrued upon such lands, or imposed in respect thereof, since the 25th day of August, 1885, or which may hereafter accrue upon or be imposed in respect of, such lands.

Second. To the payment of the expenses incurred since the 25th day of August, 1885, or which may hereafter be incurred in the care, custody, management, improvement, and in the cultivating, leasing and selling of such lands. The application of the money to these purposes shall be made from time to time, pursuant to and in accordance with the direction of the railway company; and the said trustees shall at all times apply any moneys or evidences of indebtedness held by them as purchase-money, or deferred payments on account of purchase-money, of any of such lands to the purposes hereinabove referred to, on the requisition of said company through its proper officers.

Third. The net proceeds of such sales or disposition thereof, and of collections of such deferred payments, after payment of amounts as are prescribed in clause "first" and "second" hereof to be paid, shall be applied *pro rata* to or towards the payment and discharge of the said land-grant income bonds issued and secured hereunder, upon the production of such bonds for the endorsement of such payments thereon, but the trustees hereunder shall not be required to make such application of proceeds to the payment and discharge of said land-grant income bonds, except when and as they shall have in their hands applicable to such purpose moneys sufficient to pay at least one per cent. upon such land-grant income bonds then outstanding.

Provided, however, and the foregoing provisions and stipulations in respect to the sales of lands and the disposition to be made of the proceeds thereof, and of collections of deferred payments on lands sold, are subject to the express condition that until all of the income bonds of the Louisville, New Orleans and Texas Railway Company issued under the deed of trust securing income bonds, dated September 18, 1884, and the supplemental deed of trust securing the same, dated August 25, 1885, shall be surrendered and cancelled, and the mortgages or deeds of trust securing the same satisfied of record, the provisions of said deed of trust and supplemental deed of trust, dated September 18, 1884, and August 25, 1885, respectively, shall continue and remain in full force and effect; and all sales made in accordance therewith shall be valid and effectual as well against the rights of the trustees hereunder and the holders of bonds secured hereby as in respect of the trustees under said
95 deeds of trust and the holders of the income bonds therein referred to, and the moneys received from the proceeds of the sales of land and from collections of deferred payments, shall be held, dealt with and disposed of as prescribed in said deed of trust and supplemental deed of trust, dated September 18, 1884, and August 25, 1885, respectively, and until such income bonds shall be so surrendered and cancelled, and such deeds of trust satisfied of record, the provisions hereinbefore contained in respect to the disposition of the proceeds of land sales and collections of deferred payments,

so far as the same may differ from the provisions of said deed of trust and supplemental deed of trust hereinbefore referred to, shall not take effect, but when all of said income bonds shall be surrendered and cancelled, and said mortgages or deeds of trust, dated September 18, 1884; and August 25, 1885, respectively, securing the same, shall be satisfied of record, then the provisions of this deed of trust in respect to land sales and the disposition of the proceeds thereof and of collections of deferred payments shall take full effect.

And provided further, and it is likewise an express condition of this indenture, that until the party of the first part, its successors and assigns, shall have made some default in the payment of the said bonds hereby secured, or of some of such bonds, the said party of the first part, its successors and assigns, shall be entitled to continue in the possession, use and enjoyment of the said mortgaged premises, and in receipt of the income, rents and profits thereof.

But it is an express condition and agreement that the rents, issues and profits of the said lands shall be applied from time to time as they shall be received by the company to such payments as at such time are authorized hereinbefore to be made out of the proceeds of the sales of said lands.

And it is hereby further provided, declared, granted and agreed, that the bonds which may be issued from time to time under this mortgage shall not exceed twenty thousand dollars for each mile of railroad at the time constructed ready for operation, and that the said trustees, or their successors or successor in the trust, shall accept a certificate signed by the president of the party of the first part or its successors, as conclusive evidence of the number of miles of road constructed ready for operation, and the said trustees or their successors shall not be required to look beyond the certificate of the president as herein provided and shall not be responsible in any event for any act done in pursuance of such certificate.

And it is hereby further provided, declared, granted and agreed, that the bonds which have been, or are to be, issued here-
96 under are and shall be serial numbers from one to ten thousand, inclusive, and that no more shall be issued thereunder, and none other shall participate in the benefits or security hereof.

And it is hereby further provided, declared, granted and agreed, that in case default shall be made in the payment of the principal of said bonds hereby secured, or of any of such bonds, when such principal shall be due and payable, then, and in that event, the said parties of the second part, or their successors in the said trust, shall be entitled to, and may, and upon the requisition in writing to that effect of holders of a majority of such bonds hereby secured, and upon being duly and properly indemnified by such bondholders against expense or loss in the premises, shall, either personally, or by agent or attorney, enter into and upon such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, and shall have, hold and possess the same, with the rights and privileges thereunto appertaining.

And thereupon it shall be lawful for the said parties of the second part hereto, or their successors in the trust, either personally or by attorney or agent duly constituted therefor by the said trustees, to sell and dispose of all such part of the said mortgaged premises as shall then remain subject to the lien and operation of this indenture of mortgage, at public auction to the highest bidder, either in the city of New York, in the State of New York, or in the city of Vicksburg, in the State of Mississippi, as the said trustees may in their discretion designate, and at such time as they may appoint therefor; provided, however, and it is hereby declared and agreed that preparatory to such auction sale as aforesaid, the said trustee shall give public notice of the time and place, when and where the same is to be made, and of the property to be sold, by advertisement in a newspaper published in the said city of Vicksburg, and in two newspapers of good circulation published in the city of New York, and that such advertisements shall be published in each of such newspapers at least twice in each week for the twelve successive weeks next previous to the day fixed for such sale, with the right, however, to the trustees, after such notice shall have been so published, to adjourn the sale so advertised, from time to time, in the discretion of the trustees, giving reasonable notice or notices of such adjournment or adjournments, and, after so adjourning, to make the sale at the time to which it may be finally adjourned. And it shall be lawful for the said trustees, and they are expressly authorized and empowered upon making any such auction sale of such part of such mortgaged premises as above authorized, to make and deliver to the purchaser or purchasers thereof at such sale, upon his or their paying the purchase money therefor, a good and
97 sufficient deed or deeds of conveyance in the law of the same, which auction sale and the deed or deeds thereupon made as above authorized, it is hereby granted, declared and agreed, shall be good and valid in the law, and shall operate to vest in the grantee or grantees in such conveyances such part of such mortgaged premises so sold in fee-simple and absolutely; and such deed or deeds shall operate to foreclose all equity of redemption of the said party of the first part and its successors or assigns, and shall be a perpetual bar both at law and equity, against the said party of the first part, its successors and assigns, and against any and all persons or corporations claiming, or to claim, such part of such mortgaged premises so sold and conveyed, or any thereof, by from, through or under the said party of the first part, or its successors or assigns.

And it is further provided, declared and agreed, that, from the proceeds of such sale made as aforesaid, the said trustees shall be entitled, in the first place, to deduct and retain or pay for all proper charges or expenses of, or incident to, such advertisement, foreclosure, and sale, and conveyance, including attorney's and counsel's fees, and any and all unreimbursed advances, expenses, charges, and liabilities which may have been properly made or incurred by such trustees in taking possession of such part of said mortgaged premises, or managing the same while in their possession, or in arranging for and completing the sale aforesaid; and also unreimbursed pay-

ments which may have been made by the said trustees for taxes or assessments, and for charges or liens prior to the lien of this indenture, if any such there shall be, as well as the just and reasonable compensation for the services of such trustees in the premises, and the said trustees shall apply the residue of the proceeds of such sale, after the deductions and payments above authorized to be first made thereon, to the payment of the principal of the said land-grant income bonds by this mortgage secured, or intended so to be, or of such of said bonds as may at that time remain outstanding and unpaid; and likewise to the payment of the interest which, according to the provisions, stipulations and conditions of said bonds, shall have accrued up to that time upon the principal of the said bonds thereby secured, and which shall remain unpaid and properly payable, with any interest accrued on such interest after default, without discrimination or preference as between principal and interest, but ratably according to the aggregate amount of such unpaid principal and accrued unpaid interest, which payments shall be made to the bondholders, without any discrimination or preference between them on account of the time of the actual issuing of the bonds, or the time of maturing of the interest thereon.

98 And it is further declared and agreed, that the receipt of the trustees who shall make the sale hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns, or personal representatives, shall not, after paying such purchase-money and receiving such trustees' receipt therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication, or non-application of such purchase-money by the trustees.

And it is hereby further provided, declared and agreed that the trustees under this indenture, or their successors, upon payment to them of their reasonable claims of charges for services rendered in the trust up to that time, may at any time be removed from the trust by instrument in writing, or concurrent instruments in writing, under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized.

And it is hereby further provided, declared and agreed, that any vacancy in the office of trustee hereunder may be permanently filled by the appointment of a new trustee or new trustees, by an instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto authorized, but that the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon his, its or their appointment,

and without any further act, deed or conveyance, become and be vested with all of the estate, trust, rights, powers and duties of the trustee or trustees in whose place he, it or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns shall and will, upon request, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustee or new trustees, such estate, trusts, rights, powers and duties, according to the intent above expressed.

And it is hereby further provided, declared and agreed, that the trustees hereunder shall at once execute a good and sufficient
99 bond, with sufficient surety, in the penalty of $50,000, to secure the faithful performance of the trusts herein assumed, payable to the party of the first part for the benefit of itself and the holders of the bonds herein secured; and shall be entitled to receive reasonable compensation for all services performed, and the repayment of all necessary or proper disbursements made by them in and about the execution of the trusts hereby created, which compensation, if there shall have been an entry by the trustees themselves, or through a receiver or receivers, upon the mortgaged premises, or a sale made of such premises in enforcement of this mortgage, shall be payable out of such mortgaged premises and the proceeds thereof.

The trustees shall not be required to take any steps in the execution of this trust which may subject them to liability or expense unless the holders of the bonds secured hereby, or some of them, shall, from time to time, as required by the trustees, give sufficient security to indemnify them against such liability or expense. The said trustees shall be at liberty to appoint counsel learned in the law in all suitable cases, and the trustees shall not be liable for any default or neglect of any cotrustee, or of any agent by them appointed, when such agent shall have been selected with reasonable discretion, and shall only be required to exercise good faith and ordinary diligence in the performance of their duties under this indenture. It is further agreed that the trustees may at any time resign and discharge themselves from their trust upon giving to the party of the first part, or its successors, ninety days' notice of their purpose so to do, unless a shorter notice may be accepted by the party of the first part or its successors therefor.

And the said party of the first part, for the considerations aforesaid, doth hereby covenant and agree to and with the said parties of the second part and their successors, as trustees, and likewise to and with the holders from time to time of the several bonds issued under and secured by this indenture, that the said party of the first part, its successors and assigns, shall and will from time to time, and at all times hereafter, upon reasonable request, make, do, execute, acknowledge, and deliver all such further acts, deeds, conveyance- and assurances in the law, for the better and more effectually assuring, conveying and confirming unto the said trustees and their successors in the trust hereby created, upon the trusts and for the uses and purposes herein expressed or intended, all and singular

the premises hereby mortgaged or conveyed in trust, or agreed or purporting or intended so to be, as by such trustees or bondholders, under the advice of counsel, shall be reasonably advised, devised or required.

And the said parties of the second part do hereby accept
100 the trusts hereby created, upon the terms and conditions hereinbefore expressed.

In witness whereof the said party of the first part hath hereto affixed its corporate seal, and caused the same to be attested by its president and secretary; and the said parties of the second part respectively have hereunto set their hands and seals the day and year first above written.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY,

[CORPORATE SEAL.] By R. T. WILSON, *President.*

Attest: C. H. BOSHER, *Sec'ty.*

E. H. PARDEE. [SEAL.]
ALBERT CROLIUS. [SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty-six, before me, William Shillaber, a duly appointed notary public, in and for the city and county of New York, State of New York, and commissioner of the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Richard T. Wilson, president of the Louisville, New Orleans and Texas Railway Company, and Charles H. Bosher, secretary of the same company, to me respectively personally known, and known to me to be such officers of the said company, who acknowledged that in pursuance of authority in them vested by the board of directors of said company, and as such president and secretary they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner of the State of Mississippi.

[COMMISSIONER'S SEAL.]

101 STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty-six,

before me, William Shillaber, a duly appointed notary public in and for the city and county of New York, and State of New York, and commissioner for the State of Mississippi in and for the State of New York, residing in said city and county of New York, personally appeared the within-named Edward H. Pardee and Albert Crolius, to me respectively personally known, and known to me to be two persons who executed the foregoing instrument, and acknowledged to me that they signed and delivered the foregoing instrument, and affixed thereto the corporate seal of said company, on the day and year therein mentioned, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 27th day of August, one thousand eight hundred and eighty-six.

[NOTARIAL SEAL.] WILLIAM SHILLABER,
Notary Public, City and County of New York,
Commissioner of the State of Mississippi.

[COMMISSIONER'S SEAL.]

UNITED STATES OF AMERICA,)
Southern District of Mississippi.)

ILLINOIS CENTRAL RAILROAD COMPANY)
vs.
WIRT ADAMS, State Revenue Agent, ET ALS.)

Know all men by these presents that we, the Illinois Central Railroad Company, as principal, and Samuel S. Carter and John Hart as sureties, are held and firmly bound unto Wirt Adams, State revenue agent, the Railroad Commission of the State of Mississippi, J. J. Evans, M. M. Evans, and John D. McInnis, members of such railroad commission, and Thos. C. Kimbrough, clerk of said commission, and any of them and each of them, in the sum of ten thousand dollars, for the payment of which well and truly to be made, we and each of us do hereby bind ourselves, our heirs, administrators, executors and assigns, and successors, firmly by these presents.

Witness our signatures, this the 5th day of August, A. D. 1898.

The condition of the above obligation is such, that whereas
102 the said Illinois Central Railroad Company has filed on the chancery side of the United States circuit court in and for the southern district of Mississippi, at Jackson, a bill in chancery against the parties above mentioned as obligees hereof, and against the Yazoo & Mississippi Valley Railroad Company, and has obtained an allowance of an injunction therein against the said parties above named as obligees hereof, as prayed for in said bill from said court:

Now, if the said Illinois Central Railroad Company shall abide the decision of said court, and pay all monies and costs which shall be adjudged against it in the case the said injunction shall be dis-

solved, then these presents shall be void; otherwise to remain in full force.

THE ILLINOIS CENTRAL
RAILROAD COMPANY,
By E. MAYES, *Attorney.*
SAM'L CARTER.
JOHN HART.

This bond approved this 5th day of August, 1898.
L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA, }
Southern District of Mississippi, at Jackson. }

In the Circuit Court of the United States for said District. In Chancery.

THE ILLINOIS CENTRAL RAILROAD COMPANY }
vs. } No. 560.
WIRT ADAMS, State Revenue Agent, ET ALS. }

Injunction Writ.

To Wirt Adams, State revenue agent, and to the Railroad Commission of the State of Mississippi and to J. J. Evans and to M. M. Evans and to John D. McInnis, members of said commission, and to Thomas C. Kimbrough, clerk of said commission, *these:*

Whereas, it has been represented to us, in our circuit court of the United States for the southern district of Mississippi, sitting at Jackson, on the part of The Illinois Central Railroad Company, complainant, that it has lately exhibited its bill of complaint in our said circuit court for the district aforesaid against you, the said Wirt Adams, State revenue agent, and against you, the said Railroad Commission of the State of Mississippi, and the said J. J.
103 Evans, and the said M. M. Evans, and the said John D. McInnis, members of said commission, and the said Thomas C. Kimbrough, clerk of said commission, and The Yazoo & Mississippi Valley Railroad Company, defendants, to be relieved touching the matters therein complained of; in which bill it is stated, amongst other things, that you, with others, are about to take measures and steps to the great injury of said complainant touching matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command and enjoin you, the said Wirt Adams, State revenue agent, and the said Railroad Commission of the State of Mississippi, and the said J. J. Evans and the said M. M. Evans, and the said John D. McInnis, members of said commission, and the said T. C. Kimbrough, clerk of said commission, each and every of you, under the pains and penalties which may fall upon you or all of you in case of disobedience, that you do absolutely desist and refrain as follows:

That the said railroad commission and the members thereof as above stated, do desist and refrain from approving, and the said railroad commission, and the members thereof as above stated, and the said T. C. Kimbrough, clerk of said commission, do desist and refrain from certifying, the assessment for taxes by said railroad commission made and ordered on the 2nd day of August, 1898, on the Natchez & Jackson railroad for the years 1886 to 1891, inclusive, or any of them to the several counties through or in which the said railroad is located, or any of them, or to any of the cities or towns along the said line of railroad; and also from approving or certifying such records of assessment and taxation, and from approving or certifying the valuation which the said railroad commission, as board of assessors of the State of Mississippi has fixed upon said railroad and from certifying their action, as such board of assessors to any county, town, or individual whatever, until the further orders of said court.

And that the said Wirt Adams, State revenue agent, do absolutely desist and refrain from beginning, by himself, or his solicitor or attorneys, or agents, or advising or inciting any of the counties or towns aforesaid to begin any suit for the recovery of any judgment or decree for the said taxes, or for the enforcement of the alleged lien for taxes for any of the years mentioned above, and from taking any proceedings looking to the subjection of the said property, known as the Natchez & Jackson railroad, to the payment of the taxes so assessed, or any of them, until the further orders of said court.

Witness the Honorable Melville W. Fuller, Chief Justice
104 of the Supreme Court of the United States, at Jackson, Mississippi, in the said district, this the fifth day of August, anno Domini, one thousand, eight hundred and ninety-eight, and the seal of the said circuit court hereunto affixed.

[Seal of the Circuit Court.]

L. B. MOSELEY, *Clerk.*

Received and filed Sept. 7th, 1898.

L. B. MOSELEY, *Clerk.*

Received the within process at Jackson, Miss., on August 5th, 1898, and executed the same as follows: Executed August 5th, 1898, upon the defendant Thos. C. Kimbrough, clerk of the railroad commission of Mississippi, in person, by handing him a true copy of this process, each for himself, and J. J. Evans, and M. M. Evans and John D. McInnis, members of said commission. Executed August 5th, 1898, upon the defendant, Wirt Adams, State revenue agent, in person, by handing to him a true copy of this process. Executed September 5th, 1898, upon the defendants J. J. Evans, M. M. Evans, and John D. McInnis, members of the railroad commission of Mississippi, in person, by handing to each of them a true copy of this process. Executed upon all of the defendants at Jackson, Miss.

F. W. COLLINS,
U. S. Marshal.

By R. O. EDWARDS,
Deputy U. S. M.

In the Circuit Court of the United States for the Southern District of Mississippi.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent; The Yazoo & Mississippi Valley Railroad Co., *et al.* } In Equity. No. 560.

Motion to Discharge Restraining Order.

Now come the defendants, Wirt Adams, State revenue agent of the State of Mississippi; J. J. Evans, M. M. Evans, and John D. McInnis, constituting the railroad commission and State railroad assessors of said State, and their clerk, —— ——, and move the court to discharge the restraining order, or temporary injunction heretofore granted, and quash the restraining or injunction writs and they object to the granting or issuance of any injunction against them, or any of them, because:

105 1st. They have no authority to distrain, or levy on or sell anything for said taxes, and were, and are merely performing the duties enjoined upon them by and under the laws of Mississippi, and an injunction against them, or any of them is a suit against the State of Mississippi and forbidden by the 11th amendment to the Constitution of the United States.

2nd. Said railroad commission in making said assessments act judicially and cannot be enjoined, and said revenue agent cannot act until after said assessments are made, approved, and the rolls sent to the various counties as required by the laws of Mississippi.

3rd. Said injunction was prematurely applied for.

4th. Plaintiff has shown no right to file the bill in this case, under the 94th equity rule or otherwise.

5th. This court has no jurisdiction.

6th. Plaintiff is not entitled to an injunction on the facts shown in the bill.

7th. There is no equity on the face of the bill.

CRITZ, BECKETT & KIMBROUGH,
CALHOUN & GREEN,
Solicitors for State Revenue Agent.

Filed January 17th, 1899.

L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, *et als.* } No. 560.

The complainant in the above-entitled cause, The Illinois Central Railroad Company, moves the court to order the issuance of a tem-

porary injunction until the final hearing and the further order of this court, as prayed for in the original bill.

MAYES & HARRIS,
Solicitors for Complainant.

Filed and entered January 18th, 1899.

L. B. MOSELEY, *Clerk.*

106 ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, Y. & M. V. R. R. Co., *et al.*, N., J. & C. } No. 560.

1. Original record of railroad commission, No. 1223.
2. Certificate of Kimbrough, clerk.
3. Mississippi Valley Co. charter.
4. Certified copy of Mills *vs.* Cook, and
5. Copy of record in Lambert case.
6. Certified copy of opinion of supreme court of Nov. 22nd, 1898.
7. Copy of opinion of supreme court June 20th, 1898.

In the Circuit Court of the United States for the Southern District of Mississippi.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS., Yazoo & Mississippi Valley Railroad Co. } In Equity. No. 560.

Agreement of Counsel.

It is agreed:

1. That the hearing of the motions to discharge the restraining order, and for an injunction, was postponed from time to time, by agreement, from September, 1898, to January, 1899; and that the cause was heard on said motions, notice being waived, in January, 1899, by agreement.

2. That in regard to the record in Miss. Mills *vs.* Cook, sheriff, that only the original bill need be copied in the transcript; and it is agreed that this bill was demurred to; the demurrer was sustained by the chancellor March 12th, 1873, and appeal to supreme court duly taken; and that the printed report of said case in 56 Miss., p. 40, may be treated as the rest of said record; and that it was decided at April term, 1878, of said court.

3. That as to the record in The Natchez, Jackson & Columbus Railroad Company *et al. vs.* Lambert, sheriff, that only the original bill and the affidavits, Exhibits D and E thereto, and the demurrer thereto need be copied in the transcript; and that to said bill there was a plea of *res adjudicata*, supported by a record, wherein
107 L., N. O. & T. R'y Co. as complainant, had sought to enjoin said Lambert from subjecting its property, acquired from N., J. & C. R. R. Co., to the payment of State and county taxes, upon substantially the same averments as in bill in N., J. & C. R. R.

Co. *vs.* Lambert, *supra*, except that it was averred that the taxes had been paid for 1891, by affidavit of proper officers of L., N. O. & T. R. R. Co., of application of the amount of said taxes on the debts of construction of the said L., N. O. & T. R'y Co., that the demurrer was sustained on March 23rd, 1893, by the chancellor, and the cause was duly appealed to the April term, 1893, returnable April 17th, 1893, and was decided by supreme court at said term on the — day of ——, 1893; and that the printed report of said case in 70 Miss., p. 779, may be treated as the rest of said record.

4. That the certified copies of the decisions of the supreme court of Mississippi rendered June 28th, 1898, and November 22nd, 1898, in the case styled "Wirt Adams, State revenue agent, appellant, *vs.* The Yazoo & Miss. Valley R. R. Co. *et al.*, appellees," need not be copied in the record, but may be used as published in the "Mississippi Decisions" and in connection with briefs of counsel.

F. A. CRITZ &
R. C. BECKETT,
S. S. CALHOUN, AND
MARCELLUS GREEN,
Sols. for Appellees, Except Y. & M. V. R. R. Co.
EDWARD MAYES,
Attorney for Appellant.
EDWARD MAYES,
Attorney for Y. & M. V. R. R. Co.

No. 1223.

JACKSON, MISSISSIPPI, *Dec.* 31, 1897.

To the railroad commissioners of the State of Mississippi, Jackson, Mississippi.

GENTLEMEN: Please take notice that the *the* following described property in said State, viz: the Natchez, Jackson & Columbus Railroad Company and the Louisville, New Orleans and Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, the property of said companies being that railroad between the cities of Natchez and Jackson in said State, known as the Natchez, Jackson & Columbus railroad, has escaped taxation during the years 1886, 1887, 1888, 1889, 1890, and 1891, because of not being assessed heretofore.

By virtue of an act of the legislature of said State, approved February 7th, 1894, entitled "An act to provide for the election of a State revenue agent to prescribe his powers and duties and
108 to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, chapter 126 of the Annotated Code of 1892" I now hereby respectfully notify you, within ten days hereafter, to make the proper assessment of said property by way of an additional assessment, or at as early a date as possible, consistent with the requirements of the law, on the rolls or tax-list in your hands, and to give ten days, or longer, notice in writing, to the Yazoo & Mississippi Valley Railroad Company and the Natchez, Jackson & Columbus Railroad

Company, whose company and property *is* so assessed, and herein fail — under the penalties imposed by said act.

Witness my signature this December 31st, 1897.

WIRT ADAMS,
State Revenue Agent.

No. 1223.

Summons to Gen. W. T. Martin.

JACKSON, MISSISSIPPI, *December 31st*, 1897.

To the railroad commission of the State of Mississippi, Jackson, Mississippi.

GENTLEMEN: Please take notice that the following-described property in said State, viz: the Natchez, Jackson and Columbus Railroad Company, and the Louisville, New Orleans & Texas Railway Company, and the Yazoo and Mississippi Valley Railroad Company, the property of said companies being that railroad between the cities of Natchez and Jackson in said State, known as the Natchez, Jackson & Columbus Railroad Company, has escaped taxation during the years 1886, 1887, 1888, 1889, 1890 and 1891, because of not being heretofore assessed:

By virtue of an act of the legislature of said State, approved February 7th, 1894, entitled "An act to provide for the election of a State revenue agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193 and 4195, chapter 128 of the Annotated Code of 1892," I now, hereby, respectfully notify you, within ten days hereafter, to make proper assessment of said property by way of an additional assessment, or at as early a date as possible consistent with the requirements of the law, on the rolls or tax-lists in your hands, and to give ten days, or longer, notice in writing, to the Yazoo & Mississippi Valley Railroad Com-
109 pany and the Natchez, Jackson & Columbus Railroad Company, whose company and property *is* so assessed, and herein fail not under the penalty imposed by said act.

Witness my signature this, December 31st, 1897.

WIRT ADAMS,
State Revenue Agent.

The State of Mississippi to the Yazoo and Mississippi Valley Railroad and the Natchez, Jackson & Columbus Railroad:

You are hereby notified to appear before the railroad commission of the State of Mississippi at their office in the capitol in the city of Jackson, Mississippi, on the 7th day of January, 1898, to show cause, if any you can, why that commission should not assess the railroad and railroad property formerly known as the Natchez, Jackson & Columbus railroad, for the years 1886, 1887, 1888, 1889, 1890 and 1891, as petitioned for by Wirt Adams, State revenue agent of said State, a copy of which is hereto attached and made part hereof.

Done in said office this 4th day of January, 1898.

In witness whereof I hereto set my hand and official seal.

[SEAL.] T. C. KIMBROUGH, *Secretary.*

The State of Mississippi to the sheriff of Adams county, Greeting:

We command you to summon Gen. W. T. Martin to be and appear before the railroad commission of Mississippi at the office of the commission at the capitol in Jackson on the 17th day of January, 1898, then and there to answer the notices herein enclosed, if to be found in your county, and further to do and receive whatever the said commission may consider or decree in this behalf. Herein fail not under the penalty provided by law, and have you then there this writ.

Witness my hand this 7th day of January, A. D. 1898.

[SEAL.] T. C. KIMBROUGH,
Clerk Railroad Commission.

Received on the 8th day of January, 1898.

S. DUNCAN BAKER, *Sheriff.*

I have this day executed the within writ personally by delivering to the within-named defendant Gen. W. T. Martin a true copy of this writ, with a true copy of each of the within notices hereto attached.

This the 11th day of January, A. D. 1898.

S. DUNCAN BAKER, *Sheriff,*
By V. M. LIDDELL, *Deputy.*

110 STATE OF MISSISSIPPI, }
County of Hinds. }

In the Matter of the Assessment of the Natchez & Jackson Railroad. No. 1223.

To the honorable the railroad commission of the State of Mississippi:

The Yazoo & Mississippi Valley Railroad Company appears and gives the said railroad commission respectfully to understand that it denies that the said property herein sought to be assessed at the instance of the said revenue agent, for the years 1886 to 1891 are subject to assessment for taxation at this time by this honorable body, and it further denies that, even if the same were subject to taxation, that said taxes can be assessed against the said Yazoo & Mississippi Valley Railroad Company.

It denies that the said property escaped taxation for the years therein mentioned for want of assessment.

And the said company further shows that the said Natchez, Jackson & Columbus Railroad Company, originally called the Natchez & Jackson Company, is now extinct. And also the said Louisville, New Orleans and Texas Railway Company is now extinct.

And the said company further shows that even if the said property were lawfully liable to be assessed for taxation, as pretended, this company cannot make and prepare the schedules called for, for the reason that during the years 1886, to 1891, inclusive, this com-

pany was not the owner of the property; nor were any of its officers and agents who would have to prepare and make such schedules; officers and agents of either said Louisville, New Orleans and Texas Railway Company, or said Natchez & Jackson Railway Company, but during such periods, and during the whole of such period, this company had no connection with said property in any manner whatever.

Respectfully submitted,

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By MAYES & HARRIS, *Attorneys.*

Filed August 2nd, 1898.

No. 1223.

To the honorable the railroad commission of the State of Mississippi:

The Yazoo & Mississippi Valley Railroad Company objects
111 to the proposed assessment of its branch from Jackson to Natchez for taxation as for the years 1886 to 1891 as proposed, for the following reasons:

Because *if* section 21 of the charter of the Mobile & Northwestern Railroad Company (Laws of 1870, page 255) extended to the Natchez, Jackson & Columbus Railroad Company by the act of August 8th, 1870; followed by the act of March 12th, 1884, (Laws 1884, page 29); and by the act of February 19th, 1890, (Laws 1890, page 675).

And because the said act of 1890 was carried out by the sale of said railroad to the Louisville, New Orleans and Texas Railway Co., as authorized.

And because, in the years 1892 the said Louisville, New Orleans & Texas Railway Company was consolidated with and onto the Yazoo & Mississippi Valley Railroad Company, as authorized by their respective charters.

And because the payments made by said section 21, so adopted, were made annually as shown, in the manner required by said statute, the affidavits therein required having been regularly and duly delivered to the respective tax collectors, and receipts for such taxes having been received *com*formably to law:

And because the profits of said railroad have never enabled it to declare the dividend provided for in said section as a limitation on the continuance of said privilege.

And because in the case of Railroad Company *vs.* Lambert, 70 Miss., 779, the entire question has been judicially determined in favor of the said company herein objecting; and said determination and record are relied on as *res adjudicata* of these matters.

Respectfully submitted.

MAYES & HARRIS,
Attorneys for Y. & M. V. Railroad.

In the Matter of the Assessment of Natchez, Jackson & Columbus R. R. from 1886 to 1891, Inclusive, on Notice of—

WIRT ADAMS, State Revenue Agent,
vs.
Y. & M. V. R. R. Co. and N., J. & C. R. R. Co. } No. 1223.

This day came to be heard this cause on the notice of Wirt Adams, State revenue agent, to this commission to assess the property and franchises of the Natchez, Jackson & Columbus Railroad Company for State, county and municipal taxes for the years
112 1886 to 1891, inclusive, and notice having been duly served on the Yazoo & Mississippi Valley Railroad Company, the present owner of the property and franchises of the Natchez, Jackson & Columbus Railroad Company, and it now here appearing by its attorney, and notice of this assessment having also been duly served on W. T. Martin, a director of the Natchez, Jackson & Columbus Railroad Company, but said Natchez, Jackson & Columbus Railroad Company, though duly summoned, came not, but made default, and said Yazoo & Mississippi Valley Company, having filed its objection to the assessment of the property and franchises of the Natchez, Jackson & Columbus Railroad Company, in writing, by its attorneys, for both parties, the said objections are hereby overruled; and the commission thereupon proceeded to hear evidence to determine what the valuation should be of said property and franchises for the said years; and thereupon, after the hearing, the examination and cross-examination of witnesses and the record and evidence presented, and each side having introduced all the evidence it desired to introduce before the commission, it is ordered:

That the said property and franchises of the said Natchez, Jackson & Columbus Railroad Company *has* escaped taxation, State, county and municipal, for the years 1896 to 1891, inclusive from not being assessed and that the same *is* hereby assessed at and for the amounts set opposite thereto on the assessment-rolls of the counties of Adams, Claiborne, Copiah, Jefferson and Hinds, and of the assessment-rolls of the several municipalities of Natchez, etc., for the years 1886 to 1891, inclusive, now here, made by the commission and which assessment-rolls are made a part of this order.

And on demand of said Yazoo & Mississippi Valley Railroad Company by its attorney, it is ordered that the said assessments so made, remain on file for thirty days for the filing of objections thereto.

A true copy of minutes.

T. C. KIMBROUGH, *Secretary.*

WIRT ADAMS, State Revenue Agent,
vs.
YAZOO & MISS. VALLEY RAILROAD, NATCHEZ, JACKSON & Columbus. } No. 1223.

Came on to be heard finally the notice and application of Wirt Adams, State revenue agent, to assess the property of the Yazoo &

Mississippi Valley Railroad Company and the Natchez, Jack-
113 son & Columbus Railroad Company, the properties of said company being the railroad between the cities of Natchez and Jackson, in the State of Mississippi, known as the Natchez, Jackson & Columbus Railroad Co., for the years from 1886 to 1891, inclusive, and notice having been issued to said Yazoo & Mississippi Valley Railroad Company and the Natchez, Jackson & Columbus Railroad Company, and duly served upon them, this cause having been continued by counsel of cause from time to time, and now, having heard argument of counsel for Wirt Adams, State revenue agent, the counsel for said railroad companies saying nothing and it appearing that the property of the said Natchez, Jackson & Columbus Railroad Company, a division of the Yazoo & Mississippi Valley Railroad Company, has escaped taxation for the years 1886, 1887, 1888, 1889, 1890 and 1891, inclusive, and that it has not been assessed for taxes for any of said years, and that it should be so assessed; and it further appearing that this commission has no schedule showing the value of the property of said railroad from 1886 to 1891, inclusive, and that no such schedules have ever been furnished by said railroad company to the auditor of public accounts as the law then required, it is therefore ordered:

That said companies be directed, and they are hereby required to furnish this commission with a complete schedule of all its property, and the value thereof for the years 1886 to 1891, inclusive, so that a proper schedule and assessment for taxes due on its property may be had for the said years, at the regular meeting of the commission to be holden in the office of the railroad commission in the city of Jackson, Mississippi, on the 1st day of August, 1898.

I, T. C. Kimbrough, clerk of the Mississippi railroad commission, hereby certify that the annexed instrument of writing is a true and correct copy of an order made by the Mississippi railroad commission on the 20th day of June, 1898.

Witness my hand and official seal this 19th day of July, 1898.

[SEAL.] T. C. KIMBROUGH, *Secretary.*

The State of Mississippi to the sheriff of Adams county, Greeting:

You are hereby commanded to subpœna Gen. Will T. Martin, a director of the Natchez, Jackson & Columbus Railroad Company, if to be found in your county, to be and appear before the railroad commission of Mississippi at their office at the capitol, in Jackson, on the 1st day of August, 1898, and then and there to answer
114 all matters pertaining to the attached order of this commission, and have there then this writ.

Witness the signature of the chairman of the railroad commission this 19th day of July, 1898.

J. J. EVANS, *Chairman.*

[SEAL.] T. C. KIMBROUGH, *Clerk.*

Received July 20th, 1898.

S. DUNCAN BAKER, *Sheriff.*

I have this day executed the within writ personally by delivering to the within-named General Will T. Martin a true copy of the attached order of the commission, a true copy of attached certificate and a true copy of this writ. This 22nd day of July, A. D. 1898.

S. DUNCAN BAKER, *Sheriff*,
By V. M. LIDDELL, *D. S.*

Office of the Mississippi Railroad Commission, Jackson, Mississippi.

In Mississippi Railroad Commission.

In re WIRT ADAMS, State Revenue Agent,
vs.
N., J. & C. DIV. OF THE YAZOO AND MISSISSIPPI VALLEY Railroad Company. } 1223.

I, T. C. Kimbrough, secretary of the said commission, hereby certify that before the service of the writ of injunction issued from the district court of the United States for the southern district of Mississippi, upon the fiat of Hon. H. C. Niles, judge of said court, in Illinois Central Railroad Co. *vs.* Wirt Adams, State revenue agent, *et als.*, the said commission made up the assessment-roll of the property of the said N. J. & C. Div. of the Yazoo and Mississippi Valley railroad for taxation under the order of said commission in this cause on August 2nd, 1898, and that the said assessment-roll has from that time been on file for objections under said order and no objections have been filed thereto.

Witness my hand and seal of office, this 30th day of August, 1898.

[SEAL.] T. C. KIMBROUGH.

115 S. B. No. 186.

An act to incorporate the Mississippi Valley Company.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That J. B. Fant, Thomas J. Malone, A. J. McConico, A. M. West, G. Burgland, R. P. Neiley and H. L. Duncan, and their associates, successors and assigns be and they are hereby incorporated under the name and style of the "Mississippi Valley Company," and by that name, style and title shall have perpetual succession, and all the privileges, franchises and immunities by law incident to a corporation, may sue and be sued, plead and be impleaded, complain and defend in all courts of law and equity, and may purchase, receive, hold and enjoy, to them, their successors and assigns, all such lands, tenements, leasehold estates and hereditaments, goods and chattels, securities, and estates, real, personal and mixed, of what kind and quality soever, and may sell and convey the same at pleasure, and shall also be authorized to erect residences, depots, engine-houses, tracks, shops and other improvements necessary for the purposes of the said corporation as hereafter defined by the second section of this act; and the same may, from time to time sell, convey, mortgage and submortgage, encumber, charge, pledge,

grant, lease, sublease, alien and dispose of, and also make and have a common seal, and the same to alter and renew at pleasure, and ordain, establish and put in execution such by-laws or ordinances, rules and regulations, as may be necessary or convenient for the government of the said corporation, not being contrary to the constitution and laws of this State, and generally may do all and singular the matters and things which to them shall appertain to do for the well-being of the said corporation and the management and ordering of the affairs and business of the same.

SECTION 2. Be it further enacted, That the corporation hereby created shall have power to contract with any person or persons, firms, corporations or any other parties whomsoever, formed or existing, or that may hereafter exist in any way; that said parties or any of them may have authority to do, to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, live stock and passengers and any other traffic by land or water from or to any part of the United States or the territories thereof, and the said company shall also have power and authority to supply or furnish all needful material, labor, implements, instruments
116 and fixtures of any and every kind whatsoever, on such terms and conditions as may be agreed upon by and between the parties respectively, and also to purchase, erect, construct, maintain or conduct in its own name, and for its own benefit or otherwise, any such works, public or private, as they may by law be authorized to do, (including also herein lines for telegraphic communication) and to aid, co-operate, and unite with any other company, person, or firm in so doing.

SECTION 3. Be it enacted further, That the company hereby created shall also have the power to make purchases and sales, for investments in the bonds, stocks and securities of the companies and to make advances of money and of credit to other companies, and to aid in like manner contractors and manufacturers, and to receive and hold on deposit, or as collateral or otherwise, any estate or property, real or personal including the notes, stocks, obligations and accounts of individuals and companies and the same to purchase, collect, adjust and settle, and also to pledge, sell and dispose thereof on such terms as may be agreed between them and the parties contracting with them and also to endorse and guarantee the payment of the ob igations of other corporations, firms and individuals, and to assume, become responsible for, execute and carry out any contracts, leases or subleases made by any company, to or with any other company or companies, individuals or firms whatsoever, provided that nothing herein contained shall be construed as to give the said corporation any banking privileges or franchises, or the privileges of making, issuing or putting in circulation any notes, bills, or other paper of any o her bank to circulate money provided, that nothing herein contained shall be construed as preventing this company from availing themselves of the provisions of the act of Congress for a national system of banking.

SECTION 4. Be it enacted further, That the company hereby created shall also have power to enter upon and occupy the lands of individuals or companies (on making payment therefor or giving security according to law) for the purpose of erecting, constructing, maintaining or managing any public work such as is provided for or mentioned in the second section of this act, and to construct and erect such works thereon and also buildings, improvements, structures, roads or fixtures as may be necessary or convenient for the purpose of said company, under the powers herein granted, and to purchase, make, use and maintain any works or improvements, connecting, or intended to be connected with the work of the said company, and to merge, consolidate or unite with the said company the improvements, property and franchises of any other company or companies on such terms and conditions, as the said company may agree upon, and to fix and regulate the tolls or charges
117 to be charged or demanded for any freight, property or passengers traveling over or passing over any improvement erected, managed or owned by the said company on any merchandise or property transported over any road whatsoever by said company, and to make from time to time dividends from the profits made by said company. Any railroad or the several railroads managed by said company shall be taxable as provided in their charter or other laws of the State and in proportion to their length within this State, respectively, and the property of said "Mississippi Valley Company" that is within the limits of the State, and all its income derived from its business within this State, shall forever be subject to taxation, the same as that of individuals, but its property beyond the limits of this State, and all its income derived from its business beyond the limits thereof shall not be subject to taxation nor shall it at any time be subject to a privilege tax, or any other tax, except as is stipulated in the constitution of the State or as provided in the acts of Congress.

SECTION 5. Be it further enacted, That the capital stock of said company shall consist of one thousand shares of the value of fifty thousand dollars each, being fifty thousand dollars, and with the privilege of increasing the same by a vote of the holders of a majority of the stock present at any annual meeting or special meeting to such an amount as they may from time to time deem needful, and the corporators or any three of them named in the first section of this act, shall have power to open books for subscription at such times and places as they may deem expedient and when not less than five hundred shares shall have been subscribed and twenty per centum thereon shall have been paid in.

The shareholders may elect not less than three nor more than nine directors to serve until the next annual election or until their successors shall be duly elected and qualified, and the directors so elected may and they are hereby authorized and empowered to have and to exercise in the name and in behalf of this company all the rights and privileges which are intended to be hereby given subject only to such liabilities as other shareholders are subject to which liabilities are no more than for the payment to the company of the

sums due or to become due on the shares held by them, over and above this no stockholder shall be individually liable and should the capital stock at any time be increased, the stockholders at the time of such increase shall be entitled to a *pro rata* share of such increase, upon the payment of the instalment thereon duly called for and whenever all increase of capital stock is made, a certificate thereof fully executed under the corporate seal of the company and signed by the president and secretary, shall be filed with the secretary of state before the same shall be deemed valid.

118 SECTION 6. Be it further enacted, That the principal office of the said company shall be in Water Valley until otherwise ordered and hereinafter provided, but the directors under such rules and regulations as they may prescribe, may establish branches or agencies in other parts of the State or elsewhere, all of the directors of said company shall be citizens of the United States and reside therein.

SECTION 7. Be it further enacted, That the directors shall be elected annually by the stockholders on the first Tuesday of June of each year, and said directors shall elect from their number at the first meeting of the board after their election a president, and shall also have power to elect from their number or otherwise a vice-president, a treasurer and secretary, and such other officers, clerks, and agents as the business of the company may require, all elections for directors shall be by ballot and every stockholder shall be entitled to one vote for each share of stock held by him either in person or by proxy, but no person shall be eligible as director who is not a stockholder to the amount of ten shares. At the annual or special meeting a quorum shall consist of stockholders in person or by proxy owning at least one-half the capital stock.

SECTION 8. Be it further enacted, That ten days' notice shall be given by publication in two newspapers published in the State of Mississippi of the time and place of the annual election which election shall be conducted by three stockholders one of which shall act as judge, and the other two as inspectors.

SECTION 9. Be it further enacted, That the board of directors shall make all by-laws necessary for conducting the business of the company, which by-laws shall at all times be accessible to persons transacting business with them. The said directors shall have power by a vote of a majority of their number at any meeting of the board to change the name of the said corporation, and the location of its principal office, or either, but no such name thus adopted shall be deemed valid until a truly certified certificate of its adoption shall be filed with the secretary of state as above provided in case of an increase of stock. The said company shall have, hold and enjoy all the rights, powers, privileges and immunities hereby granted, and such other powers and privileges as belong to corporations by the laws of this State. The directors shall have power to require payment of the amount remaining unpaid on the stock of said company, at such times and in such proportions as they shall think proper, the said assessment to be made as the by-laws of said company shall direct.

SECTION 10. Be it further enacted, That this act take effect and be in force from and after its passage.

119 Passed the house of representatives March 25, 1872.

JOHN R. LYNCH,
Speaker of the House of Representatives.

Passed the senate March 7th, 1872.

JAS. BENNETT,
President of the Senate.

Approved April 2nd, 1872.

R. C. POWERS, *Governor.*

STATE OF MISSISSIPPI,
OFFICE OF SECRETARY OF STATE,
JACKSON, MISS., *June 28th*, 1894.

I, George M. Govan, secretary of state, do certify that the act hereto attached entitled "An act supplemental to and amendatory of an act which passed the senate March 7th, 1872, and passed the house of representatives March 25, 1872, entitled 'An act to incorporate the Mississippi Valley Company,'" not yet approved, approved April 2nd, 1872, is a true and correct copy of the original on file in this office.

Given under my hand and the great seal of the State of Mississippi, this 28th day of June, 1894.

GEO. M. GOVAN,
Secretary of State.

STATE OF MISSISSIPPI,
Copiah County.

In the Chancery Court of said County, —— Term, 1878.

THE BILL OF COMPLAINT OF THE MISSISSIPPI MILLS, a Manufacturing Corporation of the State of Mississippi, Existing under that Name by Virtue of a Charter Granted by the Legislature of said State, with its Factories and Domicile in the County Aforesaid, Complainant,

against

WILLIAM W. COOK, Tax Collector of said County, Defendant.

1. The complainant states and shows to the honorable court that the Mississippi mills was incorporated under that name by an act of the legislature of the State passed July 13th, 1871, that certain property which had been owned by a corporation known as the Mississippi Manufacturing Company was sold in proceedings in bankruptcy, against said company, and purchased by certain parties who procured said act of incorporation by which it was provided that the property so purchased should in part
120 represent the capital stock of the corporation at the estimated value, and divided into shares of $1,000 each, and allotted to the several owners of the property so purchased in proportion to their interest therein, and that said owners should subscribe and pay 50 thousand dollars in like proportions, divided into shares of

1,000 dollars, and stock certificates were to be issued to each of said owners according to their interest in the property aforesaid, and subscriptions of money thus making a capital of 250 thousand dollars of paid-up stock. By a provision of the charter aforesaid, the capital stock of said corporation might be increased to 500 thousand dollars; that the property so purchased and converted into stock consisted of an establishment for the manufacture of cotton and other cloth, with other minor kinds of manufacture, to wit, buildings, machinery, and timbered lands surrounding and adjacent to the factory, and subsidiary thereto, and on part of which were erected the various structures needed for the business of manufacturing.

2. Under the charter aforesaid, the corporation, complainant, was duly organized and commenced business, but by an accidental fire, in the year 1873, its buildings and machinery were destroyed and its operations arrested. Before the happening of that event, to wit, in the year 1872, the legislature of the State had by a general law, passed an order to invite and stimulate manufacturing enterprise in the State, and to diversify and multiply its industries, declared that the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less than ten thousand dollars paid in, and not in operation before the passage of this act that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories or for money borrowed by any manufacturing company, to construct buildings or in paying debts incurred by such companies in constructing or purchasing the same, there are provisions in said act to carry the same into effect, by means of an assessment, to fix the amount of the tax, and a receipt for said taxes as though paid, but no payment in fact was to be made and in lieu of such payment, the company was required to show by affidavit, that the amount assessed had been expended in the manner, or for the purpose designated by the said act; this exemption, complainant is advised it was in spirit and in fact, was to cease when the dividend accruing should exceed 4 per cent. after payment of debts and outlays for machinery, structures, etc.

121 3. The complainant further states that the destruction by fire, as before stated, of the machinery and structures, the essential constituents of the enterprise in which the corporation had embarked while it did not put an end to the existence of the corporate body, arrested its operation and crippled the resources of the corporators, and at the time when the then stockholders were in doubt about the feasibility of any attempt by them to renew the enterprise thus destroyed, the legislature passed the act of 1873, by which the privileges and benefits of the said act of 1872 were extended to and conferred upon the complainant, and the complainant avers that said act was passed to induce a renewal of the enterprise, the utility of which was manifest to that body; and the complainant further avers and charges that the corporators, the then stockholders, were so crippled by the casualty before mentioned, that they

were unable and unwilling to replace the machinery and structures destroyed, and that the present stockholders, relying upon the act of 1873 as entitling them to the benefit of the said act of 1872, in respect to the exemption from taxes, and with a view to start the enterprise anew, purchased from the corporators of the Mississippi mills the remnant of property left by the fire which consisted almost entirely of land, constituting the site of the destroyed factory, with the surrounding and adjacent lands, the values of which depended on the locality and its adaption to the purposes of a factory by its abundance of timber for fuel and lumber for the principal enterprise, and in order to supersede the necessity of a new charter, they took from the former stockholders assignments of their stock, except as to Wm. Oliver, who retained his stock, and became a member of the reconstructed corporation, as representing the value of the remnant of property left, and thus becoming stockholders, continued the existence of the organization, being content with the charter existing and the amendment or addition thereto made by the act of 1873, which act was by the new stockholders accepted as part of said charter.

4. The complainant further states and charges that under and after the passage of the said act of 1873, with the guarantee against taxation, except according to the terms of the said act of 1872 the new stockholders, together with Wm. Oliver, of the Mississippi mills, created and put in operation the now existing manufacturing establishment, having purchased the machinery and erected the structures as they now exist by an expenditure of money to that end; that the machinery now in operation is of much greater capacity and the structures larger and more numerous, and that what now exists, and has been put in operation is a manufacturing establishment of the character
122 provided for in the said act of 1872, being a manufactory of cotton and woolen goods with other factories subsidiary to it; that in substance and in fact, and in all except the name and charter organization, it is a manufactory not in operation prior to the passage of said act, and entitled to its benefits, and complainant, is advised even without the express grant in the act of 1873, and although it may not be strictly proper as matter of pleading to make the statement, complainant, nevertheless, avers that the existing establishment is not only a new creation since the date of the act of 1872, but is a realization of the fruits anticipated by its framers. Its capital stock has been increased by about one hundred thousand dollars in paid-up subscriptions, with which machinery has been purchased, and buildings erected. The corporation now employs more than 500 operatives of whom 400 are women and children, and to render these comfortable, and contented, the corporation had erected at great expense cottages and tenements for them on the grounds adjacent to the factory, thus creating a village with its social benefits and with opportunities for education and moral and religious training.

5. The complainant further states that the original corporators purchased a body of land adjacent to the manufactory as it then existed, having in view the needed supply of fuel and lumber in

their principal business and not for speculation or profit otherwise, and — to this land by their purchase aforesaid and on which they have erected buildings for the factory offices for the care of the officers of the corporation, and tenements for the operatives, and building- for other purposes, and they have added a small outlaying tract of land, but not by way of investment; the complainant appends herewith a statement of the lands including that on which the factory proper, or its structures for machinery are erected, which list will comprise the property assessed to the corporation in the county of Copiah and which has been by the collector treated as exempt, on the corporations making the affidavit, and showing required by the act of 1872, which said corporation has been able truthfuliy to make, as to the taxes and also as to the yield of dividend to the stockholders,—all the said list of lands are as follows, to wit: The W. ½ sec. 3, township 8, range 8 east; all less N. W. ¼ of N. W. ¼ sec. 4, township 8, range 8 east; S. ½ S. W. ¼ and S. W. ¼ S. E. ¼, and S. ½ N. ½ S. E. ¼, and N. E. ¼ N. W. ¼ S. E. ¼, section 28, township 9, range 8 east; S. E. ¼ S. E. ¼, section 32, township 9, range 8 east, E. ½ and E. ½ of W. ½ less six acres section 33,
123 township 9, range 8 east; all less 55 acres in N. E. ¼ of N. E. ¼ and N. W. ¼ N. E. ¼, east of railroad, and S. E. ¼ of S. E. ¼, section 34, township 9, range 8 east; N. W. ¼ S. W. ¼ and S. W. ¼ N. W. ¼ section 35, township 9, range 8 east; S. E. ¼ N. E. ¼ sec. 7, T. 9, R. 9 east, N. W. ¼ and W. ½ N. E. ¼, and N. E. ¼ N. E. ¼ and N. ½ S. W. ¼ and S. E. ¼ S. W. ¼, and S. W. ¼ S. W. ¼, section 8, township 9, range 9 E.; N. W. ¼ N. W. ¼ sec. 17, township 9, range 9 east; N. E. ¼ of N. E. ¼ sect. 18, township 9, range 8 E.; S. W. ¼ sect. 29, township 9, range 8 east; N. ½ N. W. ¼ and S. E. ¼ S. W. ¼ sect. 32, township 9, range 8 east; W. ½ N. E. ¼ and N. W. ¼ S. E. ¼ sec. 3, township 8, range 8 east. In the town of Wesson, and in section- 6, 3 and 4, township 8, range 8 east, and sections 33 and 34, township 9, range 8 east.

The following town lots are not owned by the Mississippi mills, of the above-described lands to wit: Lot of W. H. Hallam, of Mrs. Hartwell, John Sartain, Wm. Oliver, McPherson, two lots Wimberly and Rea, and lot Mr. R. E. Ray.

The town lots in this list mentioned as not the property of the Mississippi mills, *is* not intended to be included in this suit, as said complainant has no interest in them or *no*thing to do with them. The complainant further states that the real estate originally purchased by the corporators as part of the assets of the Mississippi Manufacturing Company, consisted of the site of the factory buildings proper, and lands valueless for other than purposes immediately connected with the main business. The machinery was, and is now, impelled by steam, and fuel supplying the place of water power, and lumber for structures, and other manufactories carried on by the company then, and *to* the complainant now, were indispensable, the factory is located on wild land, distant from towns and cities. In the condition of the country it was as necessary to provide for lodging the operatives as it was to provide shelter for the machinery and the real estate aforesaid attached to the factories

was purchased and is used to supply these needs; that the act of incorporation recognized the property as pertaining to the business and authorized its conversion into capital stock, and it so exists as such stock at this time; so that it is not only property of the corporation, but property necessary to its operations, not purchased or used for profit, or as an investment, but for uses immediately connected with the main business and so employed. The complainant further states and charges that the Mississippi mills is yet largely indebted for purchases of machinery, for its manufacturing business, that its entire increase has been absorbed in such pur-
124 chases, and in the erection of the needed buildings; that no dividend has been earned, and, therefore, no dividend declared; that the increase to the stockholders consists entirely in added machinery, and in the enlarged capacity of the mills; that the general stagnation of trade, common to the whole country has affected it, and it has not been, and is not able to declare a dividend, and that its profits over and above the expenses of operating the mills, and the payment of its debts incurred in the purchase of machinery *has* not reached four per cent. and the full amount of the current year's taxes has been expended in the manner designated by the act of 1872.

And the complainant further avers that on the 14th day of December, 1877, it presented through its secretary and treasurer, Wm. Oliver, the affidavit required by the said act of 1872, to the collector, the said defendant, and demanded his receipt for the amount of the taxes assessed on the property of the corporation, but the said collector refused to give such receipt, or any receipt for the taxes of any portion of said property, unless upon the payment in cash of the tax collector's commissions and the commissions of the assessor in cash, or legal warrants for the assessment and collection of the taxes which would be due on the capital stock, the machinery, manufactured goods and the buildings in which said machinery is located, or within the necessary enclosure, around said buildings, the said defendant alleges that he will accept the affidavit aforesaid, in satisfaction of the tax due on the above-mentioned property the land which he alleges as exempt from taxation, being as follows: Five acres more or less, contained within the enclosure around the Mississippi mills, and the buildings therein situated, containing the machinery of the Mississippi mills, the same exempt under the act of 1877 of the legislature of Mississippi, the same being the enclosure in the town of Wesson, in which the Mississippi mills are located, and that the taxes due on all the other lands and property assessed to the Mississippi mills, must be paid as other taxes are paid, and that he would not receive said affidavit for the same.

And moreover the complainant charges that the said defendant insisted that the complainant should pay the taxes at the assessed value on all the property of the corporation before described and set forth in the list aforesaid, except the machinery and the buildings and ground on which they stand in which the machinery is placed or in operation and the paid-up capital stock, and manufactured goods; that the property excepted comprises almost the entire

real estate of the corporation, taking in the ground on which the tenements of the operatives are located, and on which stand other buildings and storehouses in which no machinery is placed
125 or operated, including the offices of the company, clerks and servants, and of its officers, this excepted property, complainant avers, was assessed with reference to its connection with the factories of the corporation and as a necessary adjunct to it, and the existence of the factory imparted to this property a value which it possesses for no purposes save those connected with the factories, being wildwood land principally valuable for lumber and wood. It was assessed very high at $75.00 per acre, so that the amount of taxes required to be paid for it is very large, to wit, about $4,728.68.

And the complainant further states and charges that the said defendant, the tax collector aforesaid, declared that the refusal of the complainant to pay the taxes so demanded, and the commissions aforesaid would be treated as a default by him and he has advertised and threatens to subject to sale, and will sell the real estate of the complainant on which the taxes are demanded, to be paid, any property exempt or not owned by the company for the commissions and taxes aforesaid, unless restrained by the order of this honorable court. The complainant states, as he is advised, that any such sale would be void, but it would, nevertheless, create an apparent title and give rise to litigation, and embarrass the title to the property. The complainant further states that the said collector found- his authority, or rather his pretended authority for his exaction of the taxes and commissions aforesaid, which latter are taxes under a very thin disguise, upon an act passed by the legislature of 1877, which act by the first and other sections thereof undertakes to repeal and limit the provisions of the said act of 1872. The complainant, however, charges expressly that the existing manufacturing establishment known as the Mississippi mills, was created and put in operation since the act of 1872 and since the act of 1873, making the provisions of the former act part of the charter of the Mississippi mills; that the machinery operated, and the structure containing and supporting *has* been purchased and brought into the State, and the structure built on the faith of said acts, and the expenditures very large and onerous made on the faith of said acts, and it insists that the said acts, as to it, are irrepealable, and subject to no modification without its consent, in so far as such modification may materially affect the benefits conferred by them; that the exemption from taxation as contained in the act of 1872, is part of the charter of the Mississippi mills, with all the effect as though it had been originally inserted in it, and on the faith of said act and charter, the present stockholders of the Mississippi mills made the entire expenditure by which the existing manufacturing establishment was created.

The complainant further states that said act of the legislature of 1877, as he is advised, and so advised, expressly charges
126 is in violation of the Constitution of the United States, because an act or law passed to impair the obligation of a contract,

and is therefore void, so far as the complainant is concerned, and to execute it by a forced sale of the property of the complainant, a great wrong, wherefore, the complainant prays that the said W. W. Cook, the defendant be summoned to appear as a defendant to this suit, and required to answer this bill and in the meanwhile, in order to arrest this wrongful and illegal proceeding, the complainant prays that an injunction may issue enjoining and restraining the said defendants from collecting or attempting to collect the taxes and commissions so demanded as aforesaid, by sale of the complainant's real estate or otherwise, until the further order of the court, and on final hearing of the matters of this bill, the complainant prays that said injunction be made perpetual, and that the said collector, the defendant, or his successor in office, is directed and required to execute and deliver to the complainant a proper receipt for the taxes aforesaid in accordance with the terms of the act of 1872 and 1873 without regard to the provisions of the said act of 1877, and for such other and further relief as the case made shall justify, and as in duty bound, etc.

In verification of the facts set forth in the foregoing, the said Mississippi Mills affixes hereto its corporate seal with the signature of Wm. Oliver, its secretary and treasurer.

[SEAL.] WM. OLIVER,
Sec'l'y & Treasurer.
HANNIS & GEORGE AND
HANNIS & MILLER,
Sol'rs for Compl't.

STATE OF MISSISSIPPI, }
Adams County. }

Pleas before the Honorable Claude Pintard, chancellor of the fourth chancery court district of the State of Mississippi, at a term of court begun, convened, and held at the court-house, in the city of Natchez, county of Adams and State of Mississippi, on Monday, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-three.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY ET AL. }
vs.
JAMES W. LAMBERT, Sheriff and Tax Collector of Adams County, Miss. }

Be it remembered that heretofore, to wit: on the 9th day of
127 January, A. D. 1893, the complainants, by their solicitors, Will. T. Martin and Yerger and Percy, filed their certain bill of complaint with Exhibits "A," "D," "E" and "H," thereto in the office of the chancery clerk, the said bill and exhibits being in words and figures, as follows, to wit:

STATE OF MISSISSIPPI,
Adams County.

In Chancery, to March Term, 1893.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY and The Yazoo & Mississippi Valley Railroad Company, Corporations Duly Incorporated under the Laws of the State of Mississippi and Now Existing and Having Their Domicile in said State, Complainants,

vs.

JAMES W. LAMBERT, Sheriff and Tax Collector of Adams County, Mississippi, a Citizen of said County and State, Defendant.

To the honorable chancery court of Adams county, Mississippi:

Complainants show to the court that on the 21st day of August, 1870, by act of the legislature of said State, duly enacted and approved, as required by the laws of said State, the Natchez & Jackson Railroad Company was duly and legally incorporated, and by said act of incorporation, was granted authority and empowered to construct and finally complete a single or double railroad, or way, from the city of Natchez, in said county of Adams, to the city of Jackson, in the county of Hinds, in said State. That on the 23rd day of February, 1872, by acts of the legislature of said State, approved and enacted as required by laws of said State, the charter of the Natchez & Jackson Railroad Company was so amended as to authorize said company at its pleasure to adopt the name and style of the Natchez, Jackson & Columbus Railroad Company, and to build such branches and feeders, as might be deemed practicable or necessary, and to construct its main line from Jackson to Columbus, Mississippi; and that by resolution of the board of directors of said Natchez & Jackson Railroad Company, duly passed, it was determined to accept the privilege granted to that company to change its name to that of the Natchez, Jackson & Columbus Railroad Company, and the change was made and acted on.

That on the 20th day of July, A. D. 1870, by act of the legislature of said State, duly enacted and approved, according to law,
128 the Mobile and Northwestern Railroad Company was incorporated and in the charter of the last-named company, there is, among other things, section 21, which is in the following words, to wit:

"SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources, by means of said railroad, as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional or burdensome taxation upon the people, the State hereby agrees with said company—which agreement is irrepealable, that all taxes to which said company

shall be subject for the period of 30 years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands, or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same, and it shall be the duty of the tax collector, in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from the company an affidavit, made by the president or cashier of said company that the amount of said taxes have actually and in good faith been paid and applied by said company, during the year, in payment of the debts incurred, or money borrowed as aforesaid and which receipt shall be in full of all taxes, county, State and municipal, to which the said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That on the 8th day of August, A. D. 1870, by an act of the legislature of said State, enacted and approved as by law required, supplemental to the acts of incorporation of certain railroad companies, the provisions of said section 21 of the act incorporating the said Mobile and Northwestern Railroad Company, were made to apply to the Natchez, Jackson & Columbus Railroad Company, the charter of which was so amended by said act of March 5th, 1878, as to confer upon said Natchez, Jackson & Columbus Railroad Company, all the rights, privileges, immunities and franchises theretofore granted or intended to be granted by, and embraced in the 21st section of said act, entitled: "An act to incorporate the
129 Mobile and Northwestern Railroad Company," and by said act, all taxes, State, county and municipal theretofore levied and assessed, or thereafter to be levied and assessed, upon the property of the Natchez, Jackson & Columbus Railroad Company, were by the State of Mississippi, and by the provisions of said act, appropriated and set apart, and were to be applied in the manner and for the purposes mentioned in the said 21st section of the act, incorporating the Mobile & Northwestern Railway Company, and that said appropriation and application was to continue for 30 years, from the 8th day of August, A. D. 1870.

That on the 19th day of February, A. D. 1890, the legislature of the State of Mississippi, by an act of that date enacted and approved according to the laws of said State, authorized the Natchez, Jackson & Columbus Railroad Company to sell all or any part of its railroad and other property situated in the State of Mississippi, together with all franchises, rights, privileges and immunities unto said company belonging.

Complainants further show, that on the 18th day of August, 1881, the Tennessee Southern Railroad Company was duly and regularly

incorporated under and by virtue of the laws of the State of Tennessee. That on the 8th day of August, 1870, the Vicksburg & Memphis Railroad Company; and on the 9th day of March, 1882, the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company *was* duly and regularly incorporated, under and by virtue of the laws of the State of Mississippi, and that on the 17th day of September, 1881, the New Orleans & Mississippi Valley Railroad Company was duly and regularly incorporated, under and by virtue of the laws of the State of Louisiana.

Complainant further show, that by an act of the legislature of the State of Mississippi approved March 3d, 1882, entitled "An act to authorize the Memphis & Vicksburg Railroad Company, and the Mississippi Valley & Ship Island Railroad Company, to effect a consolidation," the Memphis & Vicksburg and the Mississippi Valley and Ship Island Railroad Companies were authorized and empowered to consolidate with each other, or any other railroad company, or companies, that had been incorporated under the laws of the State of Mississippi, or any other State, and so that all companies so consolidated, should be merged into and become one company; and by said act it was provided, that the company so formed by said consolidation, should be deemed and held to be a corporation created by the laws of the State of Mississippi, and should have, enjoy and possess all the rights, ways and privileges, franchises, property, grants and immunities which at the time of the passage of the act were possessed by the companies that might enter into such consolidation, as fully as though the same were conferred specifically in said act, and to that end, the charters of the said consolidated companies should be taken and held as part of said act authorizing the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation.

That subsequent to the passage of said last-named act, an amendment thereto was passed by the legislature of the State of Mississippi, which amendment is entitled: "An act to amend an act entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3d, 1882. That said amendatory act was approved March 10th, 1882, and authorized and empowered the Memphis & Vicksburg Railroad Company and any other railroad company, or companies incorporated under the laws of this State, to consolidate in the manner, and upon the terms and conditions, and with rights and privileges and immunities in the said act mentioned with each other, or any other railroad company or companies incorporated, or organized under the laws of any other State or States, and that such consolidation might be so effected, whether the Mississippi Valley & Ship Island Railroad became a party to such consolidation or not.

That under and by virtue of the statutes of the respective States of Mississippi, Tennessee, and Louisiana in such cases made and provided, and in consideration of the mutual undertaking-, covenants and agreements then entered into by said companies, the

Tennessee Southern Railroad Company, created as aforesaid and then existing under — by virtue of the laws of the State of Tennessee, and the Memphis & Vicksburg Railroad Company, a corporation created as aforesaid, and then existing under and by virtue of the laws of the State of Mississippi; the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, a corporation created as aforesaid, and then existing under and by virtue of the laws of the State of Mississippi; and the New Orleans and Mississippi Valley Railroad Company, a corporation created as aforesaid and then existing under and by virtue of the laws of the State of Louisiana, entered into and effected the consolidation of each of said companies into one railroad company, to be thereafter known as the Louisville, New Orleans and Texas Railway Company, and that into said consolidated company has merged and consolidated the several capital stocks, franchises, grants, immunities, privileges, properties, rights of way and all property, real, personal, and mixed of the several companies as hereinbefore mentioned, as entering into said consolidation as shown by a certificate of consolidation
131 filed herewith, and marked "Exhibit A" and prayed to be taken and considered as part of this bill.

That in pursuance of said act of February 10th, 1890, hereinbefore referred to, the said Natchez, Jackson & Columbus Railroad Company did, on the 5th day of March, 1890, by deed duly executed and delivered, sell to the Louisville, New Orleans and Texas Railway Company, all the railroad property situated in the State of Mississippi, and particularly the line of railroad constructed by the said Natchez, Jackson & Columbus Railroad Company, and running from the city of Natchez, in the county of Adams, to the city of Jackson in the county of Hinds, in the State of Mississippi, together with all rights, powers, privileges and immunities possessed by said Natchez, Jackson & Columbus Railroad Company, as to said property so sold as aforesaid, and in which rights, powers, privileges and immunities, complainants charge was embraced the right to have the president or cashier of the Louisville, New Orleans & Texas Railway Company, or its successors or assigns make the aforesaid affidavit as required by sec. 21 of the act creating and incorporating the Mobile & Northwestern Railroad Company, showing the payment of the taxes then due or thereafter to become due on the property, so sold as aforesaid, by the Natchez, Jackson & Columbus Railroad Company, and the payment of the debts incurred by the said Natchez, Jackson & Columbus Railroad Company, and used by it in the construction of the railroad built by it from Natchez to Jackson, Mississippi, and also the right to have said taxes applied to the payment of said debts, so incurred in the construction of the railroad as aforesaid.

Complainants aver that said sale and conveyance to said Louisville, New Orleans and Texas Railway Company by said Natchez, Jackson & Columbus Railroad Company was made to said Louisville, New Orleans and Texas Railway Company subject to an indebtedness of the selling company, as evidenced by its bonds of one million two hundred and fifty thousand dollars, and that said

indebtedness was incurred by the said Natchez, Jackson & Columbus Railroad Company in the construction of its said railroad from Natchez to Jackson, and the said sum of one million, two hundred and fifty thousand dollars was used in the construction of its said road, by said Natchez, Jackson & Columbus Railroad Company; the road so constructed being that sold as aforesaid, to the said Louisville, New Orleans and Texas Railway Company, and that by section 25 of an act of the legislature of the State of Mississippi, entitled "An act to incorporate the New Orleans, Baton Rouge,
132 Vicksburg & Memphis Railroad Company, approved March 9th, 1882," the Louisville, New Orleans and Texas Railway Company was authorized to purchase the property, rights, powers and immunities of the Natchez, Jackson & Columbus Railroad Company from it, as hereinbefore set forth.

Complainants further show, and aver, that under charter granted to it, the Natchez, Jackson & Columbus Railroad Company constructed in Adams county, Mississippi, 14 and one hundred and twenty-eight one-thousandths miles of railroad and that these fourteen and one hundred and twenty-eight one-thousandths miles of railroad, *was* a part of that property included in the sale and conveyance by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company as hereinbefore set forth.

Complainants state and expressly charge that in the transfer and sale as aforesaid, by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, the franchises possessed by the Natchez, Jackson and Columbus Railroad Company of being a corporation *was* not sold and did not pass to the Louisville, New Orleans and Texas Railway Company by the sale aforesaid, and that the corporate existence of said Natchez, Jackson & Columbus Railroad Company, since said sale to the Louisville, New Orleans and Texas Railway Company still exists and is intact and in full force, and that the stockholders of the Natchez, Jackson & Columbus Railroad Company, since said sale to the Louisville, New Orleans and Texas Railway Company, have held meetings and elected officers as provided in the charter of that company, and that said company has now a full complement of officers, as required by the charter thereof. That the action of the legislature in extending the provisions of the 21st section of the act incorporating the Mobile & Northwestern Railroad Company to the several railroad companies named in the act of 1870, and hereinbefore set forth, was an inducement held out by the State of Mississippi, to the incorporators named in the charters of said companies and their associates to invest money in the State of Mississippi, and under said charters to construct railroads therein; that the inducement so held out by said State to the Natchez, Jackson & Columbus Railroad Company was accepted by said company, and acted on in good faith, and under its charter and the several amendments thereof, that company constructed a railroad in the State of Mississippi, from Natchez to Jackson, 93¾ miles in length, and that

thereby the charter originally incorporating the Natchez,
133 Jackson & Columbus Railroad Company and the several amendments thereto, and the provisions, privileges, and immunities contained in said 21st section of the act incorporating the Mobile & Northwestern Railroad Company and made part of the charter of the Natchez, Jackson & Columbus Railroad Company as aforesaid, became a contract between the State of Mississippi and the Natchez, Jackson & Columbus Railroad Company, which is irrepealable and inviolable.

Complainants further state that on the faith of said contract and the provisions of the charter incorporating the Natchez, Jackson & Columbus Railroad Company, and the several amendments thereto, and the privileges granted by, and the provisions contained in said 21st section of the act incorporating the Mobile and Northwestern Railroad Company, the Natchez, Jackson & Columbus Railroad Company invested its capital in the construction of the line of said road, from the city of Natchez to the city of Jackson, as aforesaid, and has, since the construction of said railroad, employed its capital in the operation and maintenance thereof, relying on said contract, and reposing in the belief that the taxes to which it was subject would be appropriated, by the State of Mississippi, to the payment of its debts and liabilities, incurred in the construction of said railroad, and as provided for by said section 21st of the act incorporating said Mobile & Northwestern Railroad Company, and that said contract and agreement on the part of the State of Mississippi, went far beyond the mere privilege of an exemption from taxation, the State having solemnly agreed in said contract, and by the acts of the legislature aforesaid, that if said company should construct a railroad as provided for in its charter and the amendments thereto and should incur debts and liabilities in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight per cent. upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of its incorporation, in 1870, should be appropriated by the State of Mississippi, to the payment of the debts and liabilities incurred by the company in building said road.

Complainants further show, and state, that, by the sale and conveyance of the said road from Natchez to Jackson, Miss., by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, together with the privileges and immunities thereunto belonging, the Louisville, New Orleans and Texas Railway Company became entitled to have the taxes on the property, so sold to it as aforesaid by the Natchez, Jackson & Columbus Railroad Company, applied to the payment of the debts incurred by the Natchez, Jackson & Columbus
134 Railroad Company in the construction of said railroad so sold, as aforesaid.

Complainants further show, that on the 17th day of February, 1882, by an act of the legislature, duly enacted and approved as required by the laws of the State of Mississippi, the Yazoo & Mis-

sissippi Valley Railroad Company was incorporated, and that it is now an existing corporation under the laws of the said State, having its domicile therein; that on the 25th day of October, 1892, the Louisville, New Orleans and Texas Railway Company was merged into and consolidated with the Yazoo & Mississippi Valley Railroad Company, and that by said merger and consolidation, the capital stock, franchises, grants, privileges, immunities, properties, rights of way and all property, real, personal and mixed, theretofore belonging to the Louisville, New Orleans and Texas Railway Company, *was* merged into, and became the property of the Yazoo & Mississippi Valley Railroad Company, all of which will fully appear by reference to a certified copy of said act of consolidation, to be filed with bill and marked "Exhibit C," and prayed to be taken as a part of this bill. That the said merger and consolidation between the said railroad companies, last named, was authorized by the charters of each of said companies, and was duly, regularly and legally made and entered into by said companies.

Complainants charge that by reason of said merger and consolidation last above named, the Yazoo & Mississippi Valley Railroad Company thereby became entitled to, and was immediately upon said merger and consolidation, possessed of all the rights, powers, privileges, and immunities theretofore belonging to said Natchez, Jackson & Columbus Railroad Company, and the said Louisville, New Orleans and Texas Railway Company, and in which said rights, powers, privileges and immunities, complainants charge, was embraced the right to have the president or cashier of the Yazoo & Mississippi Valley Railroad Company, or its successors or assigns, make the affidavit required by section 21 of the act incorporating the Mobile & Northwestern Railroad Company showing the payment and application of the taxes then due, or to become thereafter due on the property sold, as aforesaid, by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, to the payment of the debts of the Natchez, Jackson and Columbus Railroad Company, incurred by it and used by it in the construction of the railroad from Natchez to Jackson, Mississippi, and to have said taxes applied to the payment of the debts and liabilities incurred by said Natchez,
135 Jackson & Columbus Railroad Company in the construction of said railroad from Natchez to Jackson, Mississippi.

Complainants further show and charge that in the years 1891 and 1892, the Natchez, Jackson & Columbus Railroad Company, and the Louisville, New Orleans and Texas Railway Company, actually and in good faith, paid and applied the amount of taxes to which said Natchez, Jackson & Columbus Railroad Company was subject, and to which the said Louisville, New Orleans and Texas Railway Company was subject, on the property purchased by it from the Natchez, Jackson & Columbus Railroad Company for each of said years, 1891 and 1892, in the payment of the debts and liabilities incurred by said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad from Natchez to Jackson, Mississippi, and in the said county of Adams, to be used,

and which was used in the construction of said road, or in paying debts incurred in constructing the same, and that the profits of neither the Natchez, Jackson & Columbus Railroad Company, nor of the Louisville, New Orleans and Texas Railway Company, nor of the Yazoo & Mississippi Valley Railroad Company have been sufficient to enable the said companies, or either of them, to declare and pay to the stockholders thereof, an annual dividend of eight per cent., or any per cent., on the capital stock of said companies, or either of them, over and above the payment of the debts and liabilities of said companies, and each of them; and that complainants have caused to be made by the proper officer of each of the said companies, affidavits setting forth said facts, and in strict compliance with the requirements of section 21 of the act incorporating the Mobile & Northwestern Railroad Company hereinbefore fully set forth, and have presented said affidavits to the defendant in this suit, who is the sheriff and tax collector of Adams county, Mississippi, and have demanded of him as such collector, sheriff and tax collector, a receipt in full for all taxes, State, county, and municipal to which said companies, or either of them, were subject for the years 1891 and 1892, on property situated in said county of Adams, Mississippi; and that notwithstanding the payment and application of the amount of taxes to the debts and liabilities of the Natchez, Jackson, and Columbus Railroad Company, as hereinbefore set forth, and the making and presentation of the affidavits, as hereinbefore set forth, and the demand for the receipt in full for all taxes to which the companies heretofore mentioned were, or are subject in said county of Adams, for the years 1891 and 1892, the said defendant not regarding the rights of complainants, refused, and still refuses to comply with said demand.

136 The following is the amended bill of the complainants and is embraced within the following parenthesis, drawn with red ink. The portion of this transcript within the red-ink-line parenthesis contains the amendment to bill filed by complainants, February 24th, 1893.

Attest: ALLISON H. FOSTER, *Clerk.*

Chancery Court, Adams County, Mississippi.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY and The Yazoo and Mississippi Valley Railroad Company
vs.
JAMES W. LAMBERT, Sheriff and Tax Collector.
} No. 1216.

Amendment to Bill.

To be inserted at the end of line 29, page 19, of the bill herein.

"Complainants would further show that after the purchase of the property of the Natchez, Jackson & Columbus Railroad Company by the Louisville, New Orleans and Texas Railway Company as hereinbefore stated and as shown by the deed from the said Natchez,

Jackson and Columbus Railroad Company to said Louisville, New Orleans and Texas Railway Company, dated —— 28th, 1890, that the line of railroad purchased from said Natchez, Jackson & Columbus Railroad Company by said Louisville, New Orleans and Texas Railway Company, running from the city of Natchez, in the county of Adams, to the city of Jackson, in the county of Hinds, of the State of Mississippi, was operated and maintained as a separate division, and that the amounts of the receipts, expenditures and disbursements of said division of railroad running from said city of Natchez to said city of Jackson as aforesaid, were so kept by the officers of the said Louisville, New Orleans and Texas Railway Company as to enable them at all times to ascertain and furnish a full, complete and accurate statement of the receipts received from the operation and maintenance of said division of railroad; and the disbursements and expenditures made by said company in the maintenance and operation of said division of railroad, and of the gross and net earnings of said line of railroad constituting said division and running from the city of Natchez to said city of Jackson; and that at the time of purchasing said line of railroad running from the city of Natchez to the city of Jackson as aforesaid, from the said Natchez, Jackson and Columbus Railroad Company, and at the time of the making and ordering and filing the copies of the affi-
137 davits herewith filed as exhibits to this bill of complaint and showing the application of taxes, to which company was subject, to the payment of the debts and liabilities incurred by said Natchez, Jackson & Columbus Railroad Company in the construction of said road running from the city of Natchez to said city of Jackson as aforesaid, there was a contract existing between the State of Mississippi and the said Natchez, Jackson and Columbus Railroad Company, and said Louisville, New Orleans and Texas Railway Company, authorizing each of said companies and empowering them under said contract to apply to the payment of the debts and liabilities which said companies had incurred in the construction of railroads in the State of Mississippi, all taxes to which said companies, or either of them were subject; and that the taxes sought to be collected by defendant on the line of railroad from Natchez to Jackson, sold as aforesaid by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company had, prior to the attempt of defendant to collect said taxes, been applied by complainants as they were authorized by law to do, to the debts incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the line of railroad from the city of Natchez to the city of Jackson, sold as aforesaid by the Natchez, Jackson & Columbus Railroad Company, to the said Louisville, New Orleans and Texas Railway Company."

Agreed, that this amendment shall now be filed to take effect as if it had been embraced in the original bill herein.

Natchez, February 24, 1893.

K. PALMER LANNEAU,
Sol. for Def't.

Complainants charge that defendant, as sheriff and tax collector of said Adams county, is and was by law required to accept said affidavits and give a receipt in full for the taxes hereinbefore mentioned, as well as any privilege tax that had been, or might be demanded, by said State of Mississippi, or to which complainants, or the Louisville, New Orleans & Texas Railway Company was, or might be, subjected, on the part of said railroad operated in said Adams county, Mississippi; that the payment and application of said taxes, the making of said affidavits, the presentation thereof to defendant and his refusal to deliver said tax receipts as required by section 21 of the act incorporating the Mobile & Northwestern Railroad Company, will fully appear by an examination of a true copy of said affidavits made and presented as aforesaid, together with the indorsement of the defendant thereon, the originals
138 whereof are now on file in your honor's court as Exhibits "D," "E," "F" and "G," to bill of complaint in the suit filed by your complainant *vs.* defendant to enjoin the collection of State and county taxes for the years 1891 and 1892 on the property of complainants in said Adams county, Mississippi, and also the certificate of said sheriff and tax collector, that the Mississippi railroad commission of the State of Mississippi, during the month of November, 1892, certified to him, said defendant, that privilege taxes were due for the year 1892, due by the said Louisville, New Orleans & Texas Railway Company, Natchez, Jackson & Columbus division, assessed by said commission as "class 3rd," at the valuation of $10,000 per mile, and on 13.300 miles, the total privilege tax claimed being $133.00, and that in default of payment of said privilege tax, he did, on the 30th day of December, levy on passenger coach No. 11, then on the railroad at complainants' The Yazoo & Mississippi Valley's depot in the city of Natchez, Mississippi, as will more fully appear by reference to copies of said affidavits, indorsements thereon and said certificate of sheriff to be filed herewith as Exhibits "D," "E," "F" and "H," and prayed to be taken as a part of this bill.

That prior to the levy on said car, which said defendant has seized and advertised for sale, to wit: on the — day of December, 1892, the said affidavits were again presented to said defendant as sheriff and tax collector, and a receipt for said privilege taxes so assessed, as shown above, was demanded by complainants, and was refused by defendant, and he has advertised said car for public sale, to enable him to collect said privilege tax, and will proceed to sell it unless restrained by order of this court, to the great damage of and violation of the rights of complainants as hereinbefore set forth.

Complainants further show, that having refused to receive or recognize the affidavits of complainants, showing the payment and application of the taxes of 1891 and 1892 to the debts and liabilities of the Natchez, Jackson & Columbus Railroad Company, incurred and used in the construction of the railroad running from Natchez to Jackson, Mississippi, and to give a receipt in full for said taxes, including said privilege tax, and claiming that the affidavits tend-

ered him are not sufficient in law to warrant him in giving receipts for said taxes including said privilege tax, the said defendant, sheriff and tax collector of Adams county, will, unless restrained by order of this court, proceed, as he has advertised he will do, to sell on the — day of January, 1893, the said car seized by him as aforesaid, to satisfy said demand for privilege tax of $133.00, damages and costs, regardless of the rights of complainants, as hereinbefore set forth.

139 The premises considered, complainants pray that James W. Lambert, sheriff and tax collector of Adams county, Mississippi, be made a party defendant to this bill, and be required to answer all the allegations thereof, and that he be inhibited and enjoined, by order of this court from proceeding to collect said privilege tax of $133.00, assessed by said railroad commission for the year 1892, claimed by him to be due as aforesaid on the property of complainants, derived as aforesaid from the Louisville, New Orleans and Texas Railway Company, or the Natchez, Jackson & Columbus Railroad Company, and from selling the said car levied on as aforesaid, or any other property of roads aforesaid, and that on final hearing he be perpetually enjoined from collecting said privilege tax, or interferring on account thereof with the property of complainants in the said county of Adams, and that he be required by the order of this court to deliver to complainants a receipt as by law required, for the amount of said privilege tax assessed and levied as aforesaid.

May it please your honor to grant the said complainants, the State's writ of subpœna, directed and commanding, etc.

And as in duty bound, complainants will ever pray, etc.

YERGER & PERCY AND
WILL T. MARTIN,
Complainants' Solicitors.

STATE OF MISSISSIPPI, }
Adams County. }

Personally appeared before me, Allison H. Foster, clerk of the chancery court of said county, Will T. Martin, one of the solicitors for complainants in the foregoing bill of complaint, who states on oath, that the matters and things set forth in the foregoing bill as stated therein on the knowledge of complainants or affiant are true, and those stated on the information of others, he verily believes to be true.

WILL. T. MARTIN.

Sworn to and subscribed before me this 7th day of January, A. D. 1893.

[SEAL.] ALLISON H. FOSTER, *Clerk.*

EXHIBITS "D" AND "E."

STATE OF MISSISSIPPI,
County of Adams.

Personally appeared before me, the undersigned Allison H.
140 Foster, clerk of the chancery court of the county aforesaid, A. M. Cooke, president of the Natchez, Jackson & Columbus Railroad Company, with whom I am personally acquainted, and whom I know to be the president of said company, who, being first duly sworn, made oath and deposed as follows:

1. That he is the president of the Natchez, Jackson and Columbus Railroad Company, a corporation existing under the laws of the State of Mississippi.

2. That in the year 1891 the said railroad company applied as much as the sum of $75,000 *dollars* to the payment of the debts and liabilities which said company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad and paying debts incurred by said company in constructing same.

3. That the amount of all the taxes upon said railroad for the year 1891, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1891, in the payment of the debts incurred or of the money borrowed as aforesaid; and that the amount of taxes upon said railroad in the county of Adams, State of Mississippi, in and for the year 1891, have actually and in good faith been paid and applied to the payment of the debts incurred, or money borrowed in the construction of said railroad in said county of Adams during the year 1891.

4. That the income and profits derived from said railroad and the use and operation thereof for the year 1891, or for any year since its construction, have not been sufficient to pay any dividend to its stockholders or owners; and that for the year 1891, the profits of said company, or the profits derived from the use and operation of said railroad, have not either or both been sufficient to enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock, over and above the payment of its debts and liabilities.

A. M. COOKE.

Sworn to and subscribed before me this 5th day of November, A. D. 1892.

[SEAL.]

ALLISON H. FOSTER, *Clerk*,
By WM. A. FOSTER, *D. C.*

STATE OF MISSISSIPPI, }
Adams County. }

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel, I respectfully decline to give a receipt
141 for the taxes assessed against the L., N. O. & T. R. R., Natchez division, in the county of Adams and State of Mississippi, for the year 1891, said taxes not having been paid, and the within affidavit not being regarded by me as sufficient to warrant me in receiving the same in lieu of the said taxes, or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF TENNESSEE, }
County of Shelby, } *ss:*

Personally appeared before me, the undersigned H. B. Belt, a commissioner for the State of Mississippi, duly appointed and qualified according to the laws thereof, and resident in Memphis, Tennessee, James M. Edwards with whom I am personally acquainted who, being first duly sworn, made oath and deposed as follows:

1. That he was, prior to the 25th day of October, 1892, vice-president and cashier of the Louisville, New Orleans and Texas Railway Company, a corporation existing under the laws of the State of Mississippi, prior to said date.

2. That on the 28th day of March, 1890, the Natchez, Jackson & Columbus Railroad Company, by deed duly executed and delivered, granted, bargained, sold, assigned, transferred and conveyed to the Louisville, New Orleans and Texas Railway Company as it was by law authorized to do, the railroad theretofore constructed and owned by the Natchez, Jackson & Columbus Railroad Company, from Natchez to Jackson, Mississippi, and also the immunity from taxation then held, enjoyed and possessed by said Natchez, Jackson & Columbus Railroad Company, together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company might be subject —, to the payment of the debts and liabilities which were incurred by said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad, and in paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same; and also, all other property owned at said date by the Natchez, Jackson & Columbus Railroad Company in the county of Adams and State of Mississippi.

3. That the sale, conveyance and transfer of the railroad running from Natchez to Jackson, Mississippi, and, also, the immunity from taxation then held and possessed by the Natchez, Jackson &
142 Columbus Railroad Company, together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company was subject to, to the payment of

the debts and liabilities *of* which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad running from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company to be used, and which was used, by said company, in constructing said railroad and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same, was made by said Natchez, Jackson & Columbus Railroad Company, to the Louisville, New Orleans & Texas Railway Company, subject to an indebtedness of $1,250,000, which sum was incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the railroad from Natchez to Jackson, Mississippi, by said company, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad, and paying debts incurred by said company in constructing the same, and which said indebtedness is evidenced by the bonds of the said Natchez, Jackson & Columbus Railroad Company for the said sum of $1,250,000, and which said indebtedness, and said bonds, are still outstanding and unpaid.

4. That in the year 1891, the Louisville, New Orleans and Texas Railway Company applied as much as $75,000 to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in the payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same.

5. That the amount of all the taxes upon said railroad constructed by the Natchez, Jackson & Columbus Railroad Company from Natchez to Jackson, Mississippi, and, upon the other property sold and conveyed by said company, situated in the county of Adams, State of Mississippi, to the Louisville, New Orleans and Texas Railway Company, for the year 1891, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1891, in the payment of the debts and liabilities incurred in the construction of the railroad from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company; or, in payment for money borrowed by said Natchez,

143 Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad, and paying debts incurred by said company in constructing the same; and that the amount of the taxes upon said railroad and other property, situated in the county aforesaid, conveyed by said Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Co. as aforesaid, in the county of ——, State of Mississippi, in and for the year 1891, have actually and in good faith been applied to the payment of the debts incurred, or money borrowed and used in the construction of said railroad in said county of Adams, during the year 1891.

6. That the income and profits derived from the said railroad constructed from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company, and by it sold and conveyed to the Louisville, New Orleans & Texas Railway Company, as aforesaid, and the use and operation thereof, for the year 1891, or for any year since its construction, have not been sufficient to pay any dividend to either the stockholders of the Natchez, Jackson & Columbus Railroad Company, the Louisville, New Orleans and Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company, or the owners of such railroad; and, that for the year 1891, neither the profits of the L., N. O. & T. R. R. Co., nor of the Yazoo and Mississippi Valley Railroad Company, or the profits derived from the use and operation of said railroad from Natchez to Jackson, Mississippi, have either or both been sufficient to enable either of said companies to declare and pay to the stockholders thereof an annual dividend of eight per cent., or any per cent. on the capital stock of said companies, or either of them, over and above the payment of their debts and liabilities.

7. That on the 24th day of October, 1892, the Louisville, New Orleans & Texas Railway Co. was merged into, and was consolidated with the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi, and by which the Yazoo & Mississippi Valley Railroad Company became entitled to all the property, rights, privileges, powers and immunities theretofore belonging to the said Louisville, New Orleans & Texas Railway Company.

8. That he is now the third vice-president and cashier of the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi.

JAS. M. EDWARDS,
3rd V.-P. and Cashier, Y. & M. V. R. R. Co.

Sworn to and subscribed before me, this 4 day of Nov. 1892, and in testimony whereof, witness my signature and official seal.

[SEAL.] H. B. BELT,
Com. for Miss.

144 THE STATE OF MISSISSIPPI, }
Adams County. }

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel, I respectfully decline to give a receipt for the taxes assessed against the L., N. O. & T. R. R. Co., Natchez division, in the county of Adams, State of Mississippi, for the year 1891, said taxes not having been paid and the within affidavit not being regarded by me as sufficient to warrant me in receiving the same in lieu of the said taxes, or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF MISSISSIPPI,
County of Adams.

Personally appeared before me the undersigned Allison H. Foster, clerk of the chancery court of the county aforesaid, A. M. Cooke, president of the Natchez, Jackson & Columbus Railroad Company, with whom I am personally acquainted, and whom I know to be the president of said company, who, being first duly sworn, made oath and deposed, as follows:

1. That he is the president of the Natchez, Jackson & Columbus Railroad Company, a corporation existing under the laws of the State of Mississippi. That in the year 1892, the said railroad company applied as much as the sum of $75,000 to the payment of the debts and liabilities which said company had incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company to be used, and which was used in constructing said railroad and paying debts incurred by said company in constructing said railroad company in constructing the same.

3. That the amount of all the taxes upon said railroad for the year 1892, in the county of Adams, State of Mississippi, have actual y and in good faith been paid and applied during the year 1892, in the payment of money borrowed, or debts incurred as aforesaid; and that the amount of the taxes upon said railroad in the county of Adams, State of Mississippi, in and for the year —, have actually and in good faith been paid and applied to the payment of the debts incurred or money borrowed in the construction of said railroad in said county of Adams, during the year 1892.

4. That the income and profits derived from the said railroad and the use and operation thereof for the year 1892, or for any year since its construction, have not been sufficient to pay any dividend
145 to its stockholders or owners; and that for the year 1892, the profits of said company, or the profits derived from the use and operation of said railroad have not either, or both, been sufficient to enable it to declare and pay to the stockholders an annual dividend of eight per cent., or any per cent., on its capital stock, over and above the payment of its debts and liabilities.

A. M. COOKE,
Pres't N., J. & C. R. R. Co.

Sworn to and subscribed before me this 5th day of November, A. D. 1892.

[SEAL.] ALLISON H. FOSTER, *Clerk*,
By WM. A. FOSTER, *D. C.*

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel I respectfully decline to give a receipt for the taxes assessed against the L., N. O. & T. R. R. Co., Natchez, Jackson & Columbus division, in the county of Adams, State of Mississippi, for the year 1892, said taxes not having been paid, and the within affidavit not being regarded by me as sufficient to war-

rant me in receiving the same in lieu of said taxes or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before me, the undersigned H. B. Belt, a commissioner for the State of Mississippi, duly appointed and qualified according to the laws thereof, and resident in Memphis, Tennessee, James M. Edwards, with whom I am personally acquainted, who, being by me first duly sworn, made oath and deposed, as follows:

1. That he was, prior to the 24th day of October, 1892, vice-president and cashier of the Louisville, New Orleans and Texas Railway Company, a corporation existing under the laws of the State of Mississippi prior to said date.

2. That on the 28th day of March, 1890, the Natchez, Jackson & Columbus Railroad Company, by deed duly executed and delivered, granted, bargained and sold, assigned, transferred and conveyed to the Louisville, New Orleans and Texas Railway Company, as it was by law authorized to do, the railroad theretofore constructed and owned by said Natchez, Jackson & Columbus Railroad Company, from Natchez to Jackson, Mississippi, and also the immunity
146 from taxation then held, enjoyed and possessed by said Natchez, Jackson & Columbus Railroad Company, together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company might be subject —, to the payment of the debts and liabilities which were incurred by the said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad; or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad, and in paying debts incurred by the said Natchez, Jackson & Columbus Railroad Company in constructing the same; and also all other property owned at said date by the Natchez, Jackson & Columbus Railroad Company, in the county of Adams and State of Mississippi.

3. That the sale, conveyance and transfer of the railroad running from Natchez to Jackson, Mississippi, and, also, of the immunity from taxation then held and possessed by the Natchez, Jackson & Columbus Railroad Company together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company was subject to, to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same, was made by the said

Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans & Texas Railway Company subject to an indebtedness of $1,250,000; which said sum was incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the railroad from Natchez to Jackson, Mississippi, by said company or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad, paying debts incurred by said company in constructing the same, and which said indebtedness is evidenced by the bonds of said Natchez, Jackson & Columbus Railroad Company for said sum of $1,250,000, and which said indebtedness and bonds are still outstanding and unpaid.

4. That in the year of 1892 the Louisville, New Orleans and Texas Railway Company applied as much as the sum of $75,000 to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of its railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Rail-
147 road Company to be used and which was used by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same.

5. That the amount of all the taxes upon said railroad constructed by the Natchez, Jackson & Columbus Railroad Company from Natchez to Jackson, Miss., and, upon the other property sold and conveyed by said company, situated in the county of Adams, State of Mississippi, to the Louisville, New Orleans and Texas Railway Company for the year 1892, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1892 in the payment of the debts and liabilities incurred in the construction of the railroad from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company; or, in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used in constructing said railroad and paying debts incurred by said company in constructing same; and that the amount of the taxes upon said railroad and other property, situated in the county aforesaid, conveyed by the said Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company as aforesaid, in the county of ——, State of Mississippi, in and for the year 1892, have actually and in good faith been applied to the payment of the debts incurred, or money borrowed and used in the construction of said railroad in said county of Adams, during the year 1892.

6. That the income and profits derived from said railroad constructed from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company, and by it sold and conveyed to the Louisville, New Orleans and Texas Railway Company, as aforesaid, and the use and operation thereof, for the year 1892, or for any year since its construction, have not been sufficient to pay any dividend to either the stockholders of the Natchez, Jackson

& Columbus Railroad Company, the Louisville, New Orleans and Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company, or the owners of said railroad; and that for the year 1892, neither the profits of the L, N. O. & T. R. R. Co., nor of the Yazoo & Mississippi Valley Railroad Company or the profits derived from the use and operation of said railroad from Natchez to Jackson, Mississippi, have either both been sufficient to enable either of said companies to declare and pay to the stockholders thereof an annual dividend of 8 per cent. or any per cent., on the capital stock of said companies, or either of them, over and above the payment of their debts and liabilities.

7th. That on the 24th day of October, 1892, the Louisville,
148 New Orleans and Texas Railway Company was merged into and was consolidated with the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi, and by which the Yazoo and Mississippi Valley Railroad Company became entitled to all the property, rights, privileges, powers and immunities theretofore and then belonging to the said Louisville, New Orleans & Texas Railway Company.

8th. That he is now the third vice-president and cashier of the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi.

JAS. M. EDWARDS,
3rd Vice-President and Cashier Y. & M. V. R. R. Co.

Sworn to and subscribed before me this 4th day of November, 1892, and in testimony whereof witness my signature and official seal.

[SEAL.] H. B. BELT,
Com. for Miss.

And afterwards, on March 6th, 1893, the plea and demurrer of defendant was filed, same being in the words and figures following, to wit:

The said defendant by protestation not confessing, &c., &c., for the plea unto a part of said bill of complaint, viz: unto so much and such parts of said bill, as contain allegations and references to the taxes for the year 1891, on the properties mentioned in said bill, or seeks to bring into question the right of said defendant to collect the same or to raise any issue or issues with regard to said taxes or their legality, and especially as to so much of the prayer of said bill as may seek to restrain or enjoin defendant from proceeding to collect said taxes for the year 1891, pleads and says that on the 29th day of February, A. D. 1892, the said Louisville, New Orleans & Texas Railway Company, grantee of the said Natchez, Jackson & Columbus Railroad Company and subsequently, to wit, on the 25th day of October, 1892, consolidated into the said Yazoo & Mississippi Valley Railroad Company, exhibited its bill of complaint and filed the same in this honorable court against the defendant; setting up in said bill the alleged illegality of the identical same taxes on the same property for the same year 1891 the want of authority in de-

fendant to collect the same, and praying that the collection of said taxes be enjoined; that this defendant filed his demurrer to said bill, and that thereupon such further and other proceedings were had in said cause which was and is numbered No. 1174 on
149 the general docket of this honorable court, that on the 22nd day of October, 1892, a final decree was rendered in this court sustaining said demurrer, dismissing said bill, and dissolving the injunction, and that at the same term of this court, the said complainant in said bill obtained an order allowing it an appeal from said final decree to the supreme court of the State of Mississippi, and that subsequently, to wit, on the 14th day of February, 1893, said cause No. 1174 was removed to the said supreme court and that said cause is now in said supreme court depending; all of which pleadings, proceedings and decree this defendant now here pleads in bar of the said bill of complaint herein so far as the same seeks to bring into question or raise any issue about or seeks relief against said taxes of 1891, and makes this said bill, demurrer and proceedings in said cause No. 1174, a part of this his plea as fully as if the same were incorporated herein, and alleges that in said last cause, No. 1174, all the rights of the parties to the present bill of complaint were fully settled as to said taxes for the year 1891 in this court. And so defendant prays the judgment of this honorable court whether he should be required to make any other or further answer to this present bill of complaint, as to said taxes for the year 1891 or the other matters herein pleaded against.

K. PALMER LANNEAU,
Sol. for Def't.

Sworn to and subscribed before me this 6th day of March, 1892.
ALLISON H. FOSTER, *Clerk.*

And as to all the rest, residue and remainder of the said bill of complaint of the complainants, other than those above answered by plea, the said defendant says he does demur thereto, and for causes of demurrer shows the following:

1. The said complainants have not in and by their said bill of complaint (as to said residue and remainder) made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed against this defendant.

2. It appears by complainants' own showing, in and by their said bill of complaint, that they are not entitled to the relief prayed against this defendant.

3rd. The allegations of said bill do not show any valid or sufficient reason why said sheriff and tax collector should be restrained or enjoined from proceeding to collect said taxes (of the year 1892) mentioned and sought to be enjoined in said bill of complaint.

4. The allegations of said bill do not show that complain-
150 ants or either of them are entitled to the so-called exemption from taxation alleged to have been granted to the said Natchez, Jackson & Columbus Railroad Company.

5. The said bill of complaint shows no cause or valid reason why

the said defendant sheriff and tax collector aforesaid should have been or should be required or should now be compelled to give to complainants or either of them a receipt for said taxes of 1892 for which receipt is demanded in said bill and the prayer thereof.

K. PALMER LANNEAU,
Solicitor for Defendant.

I hereby certify that I believe the above and foregoing demurrer ought to be sustained.

K. PALMER LANNEAU,
Solicitor for Defendant.

Order Discharging Restraining Order and Refusing Injunction.

In the Circuit Court of the United States, Southern District of Mississippi.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, and Yazoo & Mississippi Valley R. R. Co., *et al.* } In Equity. No. 560.

This cause came on to be heard on the motion of the defendants, except the Y. & M. V. R. R. Co., to discharge the restraining order heretofore granted, and to refuse the injunction, and on the motion of complainant to grant an injunction as prayed for in the bill, and both motions were heard together by consent, notice on both sides being waived, and the court, after hearing the pleadings, exhibits and evidence pro and con, and arguments of counsel on both sides, after due consideration, finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged, and it is further ordered that said motion to grant an injunction is overruled, and the injunction refused. It is further ordered that said motion to grant an
151 injunction is overruled, and the injunction refused. It is further ordered that the clerk of said court enter this order on the minutes of said court.

Ordered, adjudged and decreed in chambers, this Feb. 7th, 1899.

H. C. NILES,
U. S. Judge.

In the Circuit Court of the United States, Sitting at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

To the honorable the judges of the circuit court of the United States for the southern district of Mississippi, sitting at Jackson, in equity:

The above-named complainant, The Illinois Central Railroad Company, conceiving itself aggrieved by the decree made and entered on the — day of February, 1899, in the above-entitled cause, whereby the restraining order in said cause heretofore made was discharged, and whereby the motion of said complainant for a temporary injunction in this cause was refused, does hereby appeal from said order and decree to the United States circuit court of appeals for the fifth circuit, for the reasons specified in the assignment of errors which is filed herewith; and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States circuit court of appeals for the fifth circuit, and meanwhile, that the appeal bond may be fixed by your honors, and that said order discharging the restraining order in this cause be suspended pending said appeal.

This 8th day of February, 1899.

MAYES & HARRIS,
Solicitors for Complainant.

152 *Assignment of Errors.*

In the Circuit Court of the United States, Sitting at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Comes the complainant in the above-entitled cause, and for error assigned herein, says that the decree in said cause from which an appeal is prayed, is erroneous and against the just rights of said complainant for the following reasons:

1. Because on the bill and the proofs herein made, the restraining order heretofore granted should not have been discharged.

2. Because on the bill and proofs herein made, the motion for the issuance of a temporary injunction, made by complainant should have been granted, and such temporary injunction should have been ordered to issue.

Wherefore, the said complainant prays that the said decree be reversed, and that the honorable judges of the circuit court may be directed to enter a decree overruling the motion of respondents to discharge said restraining order, and further granting the motion of complainant for the issuance of a temporary injunction in accordance with the prayer of the bill.

MAYES & HARRIS,
Solicitors for Complainant.

Filed Feb. 8th, 1899.

L. B. MOSELEY, *Clerk.*

Order Granting Appeal.

In the Circuit Court of the United States, Sitting at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

The complainant in this cause having prayed an appeal
153 to the circuit court of appeals in and for the fifth circuit, from the decretal order herein rendered, whereby the restraining order heretofore issued is discharged, and the temporary injunction prayed for in the original bill is denied, such appeal is hereby this day allowed, on the execution by complainant herein of an appeal bond, conditioned according to law in the penal sum of twelve hundred dollars, with at least two good sureties, said bond to be approved by the clerk of this court; and on the execution of such bonds, said decretal order shall be superseded, pending said appeal and said restraining order retained accordingly.

Ordered, adjudged and decreed, this the 9th day of February, 1899.

H. C. NILES,
U. S. Judge.

Filed and entered February 9, 1899.

L. B. MOSELEY, *Clerk.*

Appeal Bond.

In the Circuit Court of the United States, Sitting at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

Know all men by these presents: That we, the Illinois Central Railroad Company, as principal and Samuel S. Carter and John

Hart, as sureties, are held and firmly bound unto the defendants, Wirt Adams, State revenue agent, the Railroad Commissioners of the State of Mississippi, J. J. Evans, M. M. Evans and John D. McInnis, Thos. C. Kimbrough and The Yazoo and Mississippi Valley Railroad Company, in the full and just sum of twelve hundred dollars to be paid to the said defendants, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators jointly and severally by these presents.

Sealed with our seals and dated this 9th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at a circuit court of the United States for the southern district of Mississippi, in a suit depending in said court between the said Illinois Central Railroad Company, plaintiff,
154 and the said Wirt Adams, State revenue agent, *et als.*, defendants, a decree was rendered against the said Illinois Central Railroad Company and the said Illinois Central Railroad Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a session of the United States circuit court of appeals for the fifth circuit, to be holden in the city of New Orleans, Louisiana, in said circuit, on the 18th day of February, 1899:

Now the condition of the above obligation is such, that if the said Illinois Central Railroad Company shall prosecute said appeal with effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and effect.

THE ILLINOIS CENTRAL RAILROAD CO.,
By MAYES & HARRIS, *Its Att'ys.*
SAM'L S. CARTER.
JOHN HART.

Filed February 9th, 1899.

Approved:

L. B. MOSELEY, *Clerk.* [SEAL OF THE COURT.]

Citation to U. S. Court of Appeals.

The United States Circuit Court of Appeals for the Fifth Circuit.

No. 560.

THE UNITED STATES OF AMERICA, *Fifth Judicial Circuit,* } ss:

To Wirt Adams, revenue agent of the State of Mississippi, and the Railroad Commission of the State of Mississippi, and J. J. Evans, chairman and member of said commission, and M. M. Evans and John D. McInnis, members of said commission, and Thomas C. Kimbrough, clerk of said commission, and the Yazoo & Mississippi Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the fifth circuit to be holden at the city of New Orleans, Louisiana, in
155 said circuit, on the 18th day of February, A. D. 1899, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi wherein The Illinois Central Railroad Company, a corporation and citizen of the State of Illinois, is appellant and you are appellees, to show cause, if any there be, why the decrees rendered against the said appellant, as in the said appeal and assignment of errors herewith filed should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

[Seal of the Circuit Court of the United States.]

L. B. MOSELEY, *Clerk.*

We acknowledge service of the foregoing writ for all the defendants herein except the Yazoo & Mississippi Valley Railroad Company this the 10th day of February, A. D. 1899.

CRITZ, BECKETT & KIMBROUGH,
Solicitors for Defendants.

We hereby acknowledge service of the writ as within on the Yazoo & Mississippi Valley Railroad Company this the 10th day of February, 1899.

MAYES & HARRIS,
Attorneys for the Y. & M. V. R. R.

156 In the Circuit Court of the United States for the Southern District of Mississippi.

THE ILLINOIS CENTRAL R. R. CO.
v.
WIRT ADAMS, State Revenue Agent of the State of Mississippi, *et als.* } No. 560.

Come all of the defendants herein, by solicitors, and, entering appearance herein specially and only for the purposes of this motion, move the court to dismiss the original bill herein, and for ground assign that the sole object of said original bill was for an injunction, as therein shown, which injunction was by this court refused, and from the decree refusing said injunction an appeal was prayed and granted to the United States circuit court of appeals for the fifth circuit; which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court now here shown to the court.

CRITZ, BECKET & KIMBROUGH,
CALHOON & GREEN, *For Motion.*

THE ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent of the State of Mississippi, Yazoo and Mississippi Valley R. R Co., *et al.* } No. 560.

This day came on to be heard the motion of all the defendants herein, except the Yazoo & Mississippi Valley R. R. Co., to dismiss the original bill herein, and the court having considered the same and it appearing to the court that solicitors for the complainant were present in court on the hearing of said motion, and that
157 they made no objection to the consideration of the same, upon the ground that the mandate from the United States circuit court of appeals for the fifth circuit dismissing said appeal for want of jurisdiction has not been filed in this court, and the court being of opinion that said motion should be sustained, it is ordered, adjudged, and decreed that said motion, be, and the same is hereby, sustained, and that said original bill herein be, and the same is hereby, dismissed, and that defendants go hence without delay, and that complainant be taxed with the costs of this proceeding, for which let execution issue at law; to which said order of dismissal complainant objected.

Ordered, adjudged, and decreed this first day of May, A. D. 1899.

H. C. NILES, *Judge.*

158 Circuit Court of the United States, Southern District of Mississippi, at the May Term, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

Your petitioner, The Illinois Central Railroad Company, respectfully represents that there is manifest error committed, to the injury

of the petitioner, by the final decree pronounced in this cause on the first day of May, 1899, in and by which said final decree this court refused jurisdiction of this cause and dismissed the bill of the complainant finally for want of jurisdiction and pronounced judgment against the complainant for the costs of court.

Wherefore your petitioner, The Illinois Central Railroad Company, considering itself aggrieved, prays an order granting an appeal from said final decree refusing jurisdiction of this cause to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States approved March 3rd, 1891; and petitioner herewith files its bond in the penal sum of five hundred dollars; which bond petitioner prays to be approved by the Honorable Henry C. Niles, one of the judges of this court.

And your petitioner, as in duty bound, will ever pray.

MAYES & HARRIS,
Solicitors for Compl't.

THE ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560. Assignment of Errors.

159 Comes the appellant, The Illinois Central Railroad Company, in the above-entitled cause and for error assigns as follows, to wit:

The court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same.

MAYES & HARRIS,
Solicitors for Appellant.

In the Circuit Court of the United States for the Southern District of Mississippi.

Know all men by these presents that we, The Illinois Central Railroad Company, as principal, and John Hart and Samuel S. Carter, sureties, are held and firmly bound unto Wirt Adams, State revenue agent, of Jackson, Mississippi, the Yazoo & Mississippi Valley Railroad Company, and the Railroad Commission of the State of Mississippi and J. J. Evans and M. M. Evans and John D. McInnis, members of said commission, and Thomas C. Kimbrough in the sum of five hundred dollars, to be paid to the said Wirt Adams, State revenue agent, or his successors in office and to the other obligees named; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Dated this the 3rd day of May, 1899.

Whereas the above-named Illinois Central Railroad Company has prosecuted an appeal to the Supreme Court of the United States to reverse a judgment rendered in a certain cause wherein the said appellant was complainant and the said Wirt Adams and others

were defendants, numbered 560 on the equity docket of said
160 court of the said circuit court of the United States for the southern district of Mississippi, on the 1st day of May, 1899, in favor of said Wirt Adams, State revenue agent, and others, defendants, against the said appellant:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute its said appeal to effect and answer all costs and damages *or* if it shall fail good to make its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE ILLINOIS CENTRAL
RAILROAD COMPANY,
By EDWARD MAYES, *Attorney.*
JOHN HART.
SAMUEL S. CARTER.

Approved May 3, 1899.
H. C. NILES, *Judge.*

ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by the Illinois Central Railroad Company, it is ordered that said appeal be granted, the bond therefor in the penalty of five hundred dollars having been executed, and, being approved by the court, this appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause. Unless counsel shall agree by stipulation filed with the clerk of this court in respect to the portions of the record to be transcribed and filed in the said United States Supreme Court under said appeal as prayed and granted, the appellant has leave to present the record to the court on Satur-
161 day, the 6th day of May, 1899, for the determination of what portion of the record shall be certified to said Supreme Court of the United States.

H. C. NILES, *Judge.*

UNITED STATES OF AMEICA, *ss:*

To Wirt Adams, State revenue agent, and to the Railroad Commission of the State of Mississippi, and J. J. Evans and M. M. Evans and John D. McInnis, members of said commission, and Thomas C. Kimbrough, clerk, and the Yazoo & Mississippi Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal in equity cause numbered 560, taken and allowed from the circuit court of the United States in and for the southern district of Mississippi, at Jackson, to the Supreme Court of the United States, at Washington,

in the District of Columbia, wherein The Illinois Central Railroad Company is the appellant and you are the appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in its petition for appeal is mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Niles, one of the judges of the said circuit court of the United States, this the 3rd day of May, A. D. one thousand eight hundred and ninety-nine.

H. C. NILES,
District Judge of the United States in and for the Southern District of Mississippi.

162 ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
v.
WIRT ADAMS, State Revenue Agent, ET ALS., Appellees. } No. 560.

In the above-entitled cause, on the appeal of the Illinois Central Railroad Company to the Supreme Court of the United States, we do hereby waive issuance and service of citation as to all of the appellees except The Yazoo & Mississippi Valley Railroad Company, and agree to enter and do hereby enter appearance for them in the said Supreme Court, but said appearance may be either general or on a motion to dismiss.

R. C. BECKET,
Counsel of Record.

We do hereby waive service of the foregoing citation this May 17th, 1899.

THE YAZOO & MISSISSIPPI VALLEY R. R. CO.,
By EDWARD MAYES, *Att'y.*

163 UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, at Jackson.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

I, Henry C. Niles, judge, presiding over said court at the May term, 1899, do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to the jurisdiction of said court in said cause and were in issue between the parties litigant and were discussed by counsel and considered by the court:

In the original bill filed herein the complainant alleged that it is a corporation duly organized and existing under the laws of the State of Illinois and has no corporate existence, residence, or citi-

zenship under the laws of nor in the said State of Mississippi; that it was a tax-payer of the State of Mississippi and of the district aforesaid.

It further alleged that all of the defendants to the bill were citizens and residents of the State of Mississippi and of this judicial circuit and of the said district, and that The Yazoo & Mississippi Valley Railroad Company, one of the defendants thereto, is a corporation existing alone under the laws of the said State of Mississippi and doing business in said State and in said district.

The said bill further alleged that the Natchez & Jackson Railroad Company was incorporated by the said State of Mississippi in the year 1870 for the purpose of building a railroad within the State of Mississippi, and that by its charter of incorporation, which was set forth in said bill, it was provided that all taxes to which the
164 said company should be subjected for a period of thirty years from the date of its said charter were appropriated and set apart and should be applied to the payment of the construction liabilities of said railroad, and that it was made the duty of the tax collectors of the various *tax collectors of the various* counties in which said railroad should be liable to pay taxes, on the presentation in each successive year of an affidavit made by the president or cashier of such company that during the said year the said company had made payments on account of its construction debt to an amount equal to the taxes assessed, to deliver to the said company receipts for said taxes so assessed in full, which receipt so delivered should be a full acquittance and discharge of all taxes, State, county, and municipal, to which said company and its property should be subject.

The said bill further set forth that in the year 1890 the legislature of the State of Mississippi authorized the said railroad company to sell all of its railroad property situated in this State to the Louisville, New Orleans & Texas Railway Company, together with all franchises, rights, powers, privileges, and immunities, unto said railroad company appertaining and belonging.

The bill further alleged that the said sale was accordingly made by a deed of conveyance executed in the month of March, 1890, whereby the said Louisville, New Orleans & Texas Railway Company became vested with said property and with the said rights, privileges, and immunities set forth.

The said bill further alleged that on the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company and the defendant The Yazoo & Mississippi Valley Railroad Company, by virtue of powers conferred upon them by their respective charters, consolidated with each other, and that by such consolidation the said Louisville, New Orleans & Texas Railway Com-
165 pany was merged in the said Yazoo & Mississippi Valley Railroad Company and its existence terminated, while the existence of the said last-named company continued unimpaired and unbroken, and that by virtue of such consolidation the said property that had been property of the Natchez, Jackson & Columbus Railroad Company became the property of the said Yazoo &

Mississippi Valley Railroad Company, with all the rights, privileges, and immunities appertaining thereto, as hereinbefore stated.

The said bill further averred and set forth that the supreme court of the State of Mississippi by a certain decision in the case of Mississippi Mills *v.* Cook, decided in 1878, had decided and held that the legislature of the State of Mississippi had the power under its then existing constitution to enact laws exempting property from taxation, and set forth the fact that said decision had been continuously followed in numerous designated cases by the said supreme court ever since that date.

The said bill further averred that in the case of The Railroad Company *v.* Lambert, decided by the supreme court of Mississippi in the year 1893, it had been held and determined that the said sale of 1890 did operate to transfer the said property of the Natchez & Jackson railroad to the Louisville, New Orleans & Texas Railway Company, with the said rights, privileges, and immunities hereinbefore mentioned appertaining to the same, and also had decided that the said consolidation of Oct. 24, 1892, had transferred said property, along with said rights, privileges, and immunities, to the said Yazoo & Mississippi Valley Railroad Company, and also that the said consolidation did operate by way of a merger, and did not create a new company, and also decided that section 180 of the constitution of the State of Mississippi, enacted in 1890, did not in any way affect the rights of said companies under said consolidation.

The said bill also alleged that on the 20th day of June,
166 1898, the supreme court of the State of Mississippi, in a certain litigation which had arisen subsequently to the decision of the Lambert case aforesaid, had overruled the said Lambert case and announced a new law for the said State, to wit, that under the constitution of 1869 the legislature of the State of Mississippi had no power to grant exemptions from taxation in charters of railroads, and had also decided that the said consolidation of 1892 did create a new company, which became subject to the operation of section 180 of the constitution of 1890, whereby the contract right held under the charter of the Natchez & Jackson railroad as aforesaid was lost and extinguished.

The bill further alleged that said contract right so embodied in and conferred by the charter of the said Natchez & Jackson Railroad Company was not a contract of exemption, but was exactly what it professed to be—a contract of appropriation, to endure for thirty years, which was secured and guaranteed by the provisions of the Constitution of the United States, section 10, article I.

The bill further alleged that in the year 1898 the railroad commission of the State of Mississippi, who are by law made assessors of railway property for taxation and who are the defendants to said bill, and Wirt Adams, State revenue agent of the State of Mississippi, also made defendant, inaugurated a proceeding under the statutes of the State of Mississippi passed in the year 1892 and in the year 1894 and under the said constitution of the State of Mississippi, section 180, adopted Nov. 1, 1890, to assess taxes against the property of the said Natchez & Jackson railroad, then being

property, as aforesaid, of the Yazoo & Mississippi Valley Railroad Company, to collect the same by process of law and by seizures under distress warrants and by suit thereupon brought by the said State revenue agent, and that such assessments had been made, amounting to about $60,000, and that such assessments and
167 such seizures and suits would cause cloud upon the title to said railway property and would cause multiplicity of suits, and that there was no adequate remedy at law for the injuries to be suffered therefrom.

The bill further alleged that the complainant, The Illinois Central Railroad Company, held bonds of the said Louisville, New Orleans & Texas Railway Company for large amounts which were secured by mortgages upon the property of the said Louisville, New Orleans & Texas Railway Company, including the said Natchez, Jackson railroad, and upon the profits thereof, and that said bonds had been acquired by the said complainant in the year 1892 upon the faith of the said contract hereinbefore set forth, and of the then existing decisions of the supreme court of the State of Mississippi, and that the collection of said taxes would impair the obligation of the contract of the said complainant and cast clouds upon the title of the property by which its said bonds were secured.

The said bill also set forth in considerable detail various contracts, the obligation of which would be impaired, as explained in said bill, by the collection of said taxes.

The bill alleged further that the proceeding by the said State revenue agent and the said railroad commission complained of in said bill was an attempt to enforce against the said charter rights of the said Natchez & Jackson Railroad Company as to said railroad then held and enjoyed by the Yazoo & Mississippi Valley Railroad Company, as hereinbefore set forth, and inuring to the bondholders of the said Louisville, New Orleans & Texas Railway Company, as hereinbefore described, subsequent legislation of the State of Mississippi, to wit, the said statutes of 1892 and 1894 and the said section 180 of the constitution of 1890, and to impair the obligation of the contracts in said bill set forth by the said enforcement of said subsequent legislation and said subsequent
168 provision in said constitution, all in violation of section 10, article I, of the Constitution of the United States.

And also said bill alleged that the attempt of the said railroad commission and the said revenue agent was to fasten upon the said railroad a *a* paramount lien under the subsequently enacted statutes of said State, which would displace the existing liens and mortgages upon said railroad and constitute a paramount lien thereupon as for unpaid taxes, and their proceedings to seize and sell the said railroad thereunder constitute an effort to deprive the complainant of its property and its mortgage lien, which secured the bonds belonging to the complainant, without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

Upon said bill of complaint, the undersigned, Henry C. Niles, judge, etc., did on the 4th day of August, 1898, order the issuance

of a restraining order, which issued accordingly, and on the 17th day of January, 1899, the defendants, the State revenue agent and the railroad commission and their clerk, moved the court to discharge the said restraining order on the ground, amongst others, that the court had no jurisdiction to issue the same or to entertain the cause.

And at the same time the said complainant moved the court to issue a temporary injunction as prayed in the bill.

Whereupon, on the 8th day of February, 1899, the undersigned as judge aforesaid, in vacation, made a decretal order discharging said restraining order and refused to grant a temporary injunction prayed for.

On the first day of May, 1899, being the first day of the May term, 1899, of the said circuit court, the said cause was finally dismissed by order of the court on the motion of said defendants, Wirt Adams, State revenue agent, and the said railroad commission and
169 their said clerk; to which dismissal the complainant excepted.

Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through the Yazoo & Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Yazoo & Mississippi Valley Railroad Company a party defendant in the cause.

2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

3. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

The court having dismissed the bill on the ground of want of jurisdiction, the foregoing three questions, arising upon the pleadings, the process, and the evidence, are hereby certified to the Supreme Court of the United States for its decision in conformity with the fifth section of the act of Congress of the year 1891.

Certified to by me this the 16th day of May, 1899, being a day of the current May term, 1899, of the said circuit court of the United States.

H. C. NILES, *Judge.*

170 UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, at the May Term, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 560.

In this cause the parties not having filed in this court a written agreement in respect to the parts of the record to be certified to the Supreme Court of the United States, as provided for in the decree of this court dated May 3rd, 1899, it is therefore considered by the court that the portions of the record necessary to be certified to the Supreme Court in order to present properly the questions of jurisdiction certified to said court are as follows:

1. The caption of the minutes of this court.
2. Bill of complaint.
3. Order for temporary injunction.
4. Exhibit "A" to bill of complaint.
5. Exhibit "B" to bill of complaint.
6. Exhibit "C" to bill of complaint.
7. Exhibit "D" to bill of complaint.
8. Exhibit "E" to bill of complaint.
9. Exhibit "F" to bill of complaint.
10. Exhibit "G" to bill of complaint.
11. Injunction bond.
12. Temporary injunction.
13. Motion to discharge temporary order.
14. Motion for temporary injunction.
15. Agreement as to transcript and other matters.
16. Notice of revenue agent to railroad commission.

171 17. Notice of revenue agent to railroad commission.

18. Citation from railroad commission to railroad.
19. Answer of the Yazoo & Mississippi Valley R. R. Co. to railroad commission.
20. Objection of Yazoo & Mississippi Valley R. R. Co. to proposed amendment.
21. Order of railroad commission as to assessment.
22. Order requiring railroad Co. to furnish schedules.
23. Certificate of secretary of R. R. commission as to assessments.
24. Copy of act to incorporate Mississippi Valley Company.
25. Copy of bill of complaint of The Mississippi Mills *v.* Cook, sheriff of Copiah county.
26. Copy of record from chancery court of Adams county in case of The Natchez, Jackson & Columbus R. R. Co. *et als. v.* James W. Lambert, sheriff & tax collector of Adams county.

26. Order dissolving temporary restraining order and refusing injunction.

27. Petition for appeal to U. S. circuit court of appeals.
28. Assignment of errors.
29. Order allowing appeal to circuit court of appeals.

30. Appeal bond on appeal to circuit court of appeals.
31. Citation on appeal to circuit court of appeals.
32. Motion to dismiss bill.
33. Order dismissing bill.
34. Petition for appeal to supreme court.
35. Assignment of errors.
36. Appeal bond.
37. Order granting appeal.
38. Citation.

172 39. Agreement waiving service of citation.
40. Certificate as to question of jurisdiction.
41. This order stating parts of record to be certified.

Ordered accordingly this the 16th day of May, 1899, being a day of the regular May term, 1899, of the May term, 1899, of this court.

H. C. NILES, *Judge.*

[Endorsed:] 560. Illinois Central R. R. Co. *v.* Wirt Adams, State revenue agent, *et als.* Order as to record. E. 7–240. Filed & ent. May 16, '99. L. B. Moseley, cl'k.

173 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

I, L. B. Moseley, clerk of the circuit court of the United States for the southern district of Mississippi, for the fifth circuit, sitting at Jackson, do hereby certify that the foregoing writing-, constituting one hundred & seventy-two (172) pages, annexed to this certificate, are full and true and correct copies of the originals in the case of The Illinois Central Railroad Company *v.* Wirt Adams, State revenue agent, *et als.*, as the same appear on file and are of record in my office, and that they do constitute a true and perfect copy of the record in cause number 560 on the equity docket in said court and of the assignment of errors and of all proceedings therein.

Seal U. S. Circuit Court, 5th Circuit, Southern District of Mississippi.

In witness whereof I have hereunto set my hand and the seal of this court this the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States one hundred and twenty-three.

L. B. MOSELEY, *Clerk.*

Endorsed on cover: File No., 17,433. S. Mississippi C. C. U. S. Term No., 319. The Illinois Central Railroad Company, appellant, *vs.* Wirt Adams, State revenue agent, and The Railroad Commission of the State of Mississippi *et al.* Filed June 2nd, 1899.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 179.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED JUNE 2, 1896.

(17,494.)

(17,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1899.

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1 *Caption of Minutes.*

May Term, 1899, First Day of May, 1899.

Be it remembered that a regular term of the United States circuit court for the southern district of Mississippi was begun and held at the court-room thereof, in the city of Jackson, on the first Monday of May, A. D. 1899, being the time and place for holding said court appointed by law.

There were present: Honorable H. C. Niles, judge; A. M. Lea, U. S. attorney; A. C. Melchior, ass't U. S. att'y; F. W. Collins, marshal; L. R. Moseley, clerk.

2 *Original Bill.*

THE BILL OF COMPLAINT OF THE YAZOO & MISSISSIPPI VALLEY Railroad Company, a Corporation of the State of Mississippi, a Citizen of said State and Domiciled Therein, and Resident in said State and District,

vs.

WIRT ADAMS, State Revenue Agent in and for the State of Mississippi, and W. S. Wissenger, Sheriff of De Soto County, and F. L. Hope, Sheriff of Tunica County, and F. B. Fitzgerald, Sheriff of Coahoma County, and R. M. Edwards, Sheriff of Bolivar County, and J. B. Hebron, Sheriff of Washington County, and C. H. Walton, Sheriff of Sharkey County, and R. W. Smith, Sheriff of Issaquena County, and Dan. B. Hebron, Sheriff of Warren County, and R. C. McCay, Sheriff of Claiborne County, and C. C. Coffey, Sheriff of Jefferson County, and J. R. Jones, Sheriff of Franklin County, and J. B. Turnipseed, Sheriff of Amite County, and J. M. Sessions, Sheriff of Wilkinson County, and J. H. Sullivan, Sheriff of Tallahatchie County, and J. B. Humphreys, Sheriff of Leflore County, and S. Duncan Baker, Sheriff of Adams County, and W. T. Ratliff, Sheriff of Hinds County.

To the honorable the judges of the circuit court of the United States in and for the southern district of Mississippi, sitting at Jackson, in said district, in equity:

I.

Humbly complaining showeth unto your honors that your orator, The Yazoo & Mississippi Valley Railroad Company, is a corporation of the State of Mississippi, chartered and organized under the laws thereof, domiciled within said State and resident within said State and the southern district thereof; and also that all of the counties above named are counties of and in said State of Mississippi, and all of the same lie within the said southern district, except the counties of De Soto, Tunica, Coahoma, Tallahatchie, and Leflore, which are in the northern district of said State; and that all of the defendants herein named as sheriffs of said counties are citizens of said State of

Mississippi and resident within the counties in and for which they are sheriffs as stated, being all of them resident in said south-
3 ern district, except the said sheriffs of De Soto, Tunica, Coahoma and Leflore counties, who are resident in the northern district of said State.

II.

Your orator further shows that by an act, approved July 20th, 1870, the legislature of the said State of Mississippi incorporated the Mobile & Northwestern Railroad Company, and that section 21 of the charter thereof was in words and figures as follows, to wit:

"SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from the said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal to which company shall be subject; provided, however, that whenever the profits of said company shall enable said company to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector to be by him paid over as required by law."

III.

Your orator further shows that the said legislature of the said State, by another act entitled, "An act to incorporate the Natchez &
4 Jackson Railroad Company," approved July 21st, 1870, did incorporate the railroad company of that name, with authority to build a line of railroad from Natchez to Jackson, in the State of Mississippi; and the charter of said railroad company was subsequently amended so as to change the name thereof to the "Natchez, Jackson & Columbus Railroad Company."

IV.

Your orator further states that by another act, approved August 8th, 1870, entitled "An act supplemental to the acts of incorporation of certain railroad companies," the said legislature of said State, extended the privilege of section 21 of the Mobile & Northwestern charter to various railroad companies named in said act, and amongst others, to the Natchez & Jackson railroad.

V.

Your orator further states that the said Natchez & Jackson Railroad Company did accept their said charter from said State, including the provisions of the said section 21 of the Mobile & Northwestern Railroad Company'- charter so extended to it as aforesaid, and organized under the same, and proceeding, after some delay, but yet in due course, did build and construct and proceed to operate and maintain the said line of railroad from Natchez to Jackson in said State as aforesaid, relying upon said charter, including the said provisions of section 21; and did in the construction of said railroad, expend various large sums of money to an enormous aggregate, and did incur a large construction debt evidenced by bonds of the said company to the amount of $1,250,000.00.

VI.

Your orator further states that the said provisions of section 21 so extended to the said Natchez & Jackson Railroad Company, and accepted by it and acted by it as aforesaid, did constitute a contract between the said company and the State of Mississippi, irrepealable in the period during which, by the terms of said section, the application was to last, that is to say, irrepealable for the period of thirty years from the said 8th day of August, 1870. Said contract was a contract of appropriation, as appears on the face of said section, and by its terms, whereby the legislature in consideration of the construction of the said railroad, did appropriate and set apart all taxes to which the said company should be liable or subject, for the period of thirty years, including both privilege and ad valorem taxes to be applied to the payment of debts and liabilities which the said company should incur in the construction of said road, or for the payment of money borrowed by said company, upon lands or otherwise, to be used in constructing said road, or for the payments of debts incurred, or for the payment of money borrowed by the company to pay debts incurred by the same in constructing the said road (for any of said purposes); and it was made the duty of the tax collector in every county in which, or through which the said road was constructed and should become taxable, in each and every year, to give the company a receipt in full for the amount of said taxes, upon receiving from the said company affidavit made by the president or cashier thereof, that the amount of said taxes had actually and in good faith been paid and applied by said company during such year in payment of the debts or liabilities aforesaid, which receipt so given was to be in

full discharge of all State and municipal taxes, privilege or ad valorem, to which said company should be subject during the period aforesaid. In short, the said provisions of section 21 constituted, and were a special and peculiar method of granting aid by the State to the construction of the railroad contemplated in said charter, whereby a sum of money was contributed by the State to the said company, in aid, equal to the entire taxes assessed against such company during each said year, and the company was absolved from the useless formality of paying the taxes lawfully assessed against the same into the respective State, county, and municipal treasuries, and then drawing from the said treasuries, in the usual manner prescribed by law, a sum equal to the aggregate of such payments; but in lieu of such troublesome and unnecessary detail, it was by the said act provided and contracted that the sheriffs of the respective counties in their capacity of tax collector, should give, on the presentation of the proper affidavits, receipts in full against such taxes.

VII.

Your orator states further, that by an act entitled "An act to incorporate the Memphis & Vicksburg Railroad Company," approved Aug. 8th, 1870, the said legislature of said State did incorporate the Memphis & Vicksburg Railroad Company, authorizing the same to build and operate a line of railroad from Vicksburg, in the county of Warren, in said State, northerly to the Tennessee line in the direction of Memphis, in the State of Tennessee; and by still another act, entitled "An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to effect a consolidation," approved March 3d, 1882, it was provided that the two companies named in the title to said act might consolidate with each other, and with any other railroad companies incorporated by the said State or any other State, and form thereby a railroad company which should be a Mississippi corporation, and should enjoy all the rights, privileges, immunities, franchises, etc., of the constituent companies. The said act of March 3d, 1882, was amended by an act of the said legislature of March, 1884, entitled, "An act to amend an act entitled 'An act to authorize the Memphis & Vicksburg Railroad Company, and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation,'" approved March 3d, 1882, by which amendatory act it was provided that the company contemplated to be formed by the said act of March 3d, 1882, might be formed by consolidation between the Memphis & Vicksburg Railroad Company, and any other railroad company or companies incorporated by this State or by any other State, and being so formed, should be entitled to all the rights, privileges, franchises, immunities, etc., stipulated for and conced*ing* in said act of March 3, 1882: by which amendment the necessity for the entrance into said consolidated company of the Mississippi Valley & Ship Island railroad as a constituent part thereof was dispensed with.

6

VIII.

Your orator states that section 5 of said act of March 3d, 1882, was in words and figures as follows, to wit:

"SEC. 5. Be it further enacted: That the provisions of the twenty-first section of an act entitled 'An act to incorporate the Mobile & Northwestern railroad,' approved July 20, 1870, is hereby made to apply to the said consolidated company, and for that purpose the said section is hereby declared to be a part of this act, and this section shall be construed as though the said twenty-first section was specially and fully set out herein; but this section shall not be in force for a longer time than twenty-five years from the approval of this act."

IX.

Your orator states that under and by virtue of the said act of March 3d, 1882, and amendatory act of March, 1884, a certain railroad company was constituted and organized by the consolidation of the said Memphis & Vicksburg Railroad Company with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company which had also been incorporated by the legislature of the State of Mississippi in the year 1882, with a Louisiana railroad company, and also with a Tennessee railroad company, the object of such consolidated railroad company being the construction of a through line of railroad from the city of Memphis, in the State of Tennessee, to the city of New Orleans, in the State of Louisiana, by way of Vicksburg, in the State of Mississippi. The said railroad company so formed, adopted the name of the "Louisville, New Orleans
7 and Texas Railway Company," and proceeding under the charters of its constituent companies under the act of March 3d, 1882, and the said amendatory act of March, 1884, it speedily constructed the railroad contemplated, so that the said railroad was so far complete as that the through connection between its various working gangs was made, and the first train ran on or about the first of October, 1884.

The said "Louisville, New Orleans and Texas Railway Company" was organized, relying upon the said charter provisions of the act of March 3d, 1882, and constructed its railroad as aforesaid upon the faith thereof, including the provisions of the said 21st section of the Mobile & Northwestern Railroad charter so extended to it by section 5 of the said act of 1884, March 3d. The said section 5 of the said act of 1882 did constitute a contract between the said State of Mississippi and the Louisville, New Orleans & Texas Railway Company, of the same scope and import as herein already stated in connection with the Natchez & Jackson railroad, — are hereby reiterated as to the effect and nature of such contract as between the said State and the said Louisville, New Orleans & Texas Railway Company.

X.

Your orator further shows that in the year 1890, the legislature of the State of Mississippi passed an act entitled "An act to authorize the Natchez, Jackson & Columbus Railroad Company to sell its rail-

road situate in this State or to consolidate the same," which was approved February 19, 1890. By said act, the said Natchez, Jackson & Columbus Railroad Company was authorized and empowered to sell absolutely all or any part of its railroad and other property lying and being and situated in the State of Mississippi, together with all franchises, rights, powers, priviliges and immunities unto the said Natchez, Jackson & Columbus Railroad Company appertaining and belonging.

Under and pursuant to the said act of 1890 the said Natchez, Jackson & Columbus Railroad Company, did in the month of March, 1890, sell and convey to the said Louisville, New Orleans & Texas Railway Company for the sum of $180,000, in cash, the said railroad so by it constructed and operated from Natchez to Jackson, together with all the said franchises, rights, powers, privileges and immunities: such sale being subject to the outstanding mortgage construction debt aforesaid, amounting to $1,250,000.00, of six per cent. bonds. A copy of the conveyances of the said Natchez, Jackson & Columbus Railroad Company to the said Louisville, New Orleans & Texas Railway Company is herewith filed and marked "Ex-
8 hibit A," and prayed to be taken as a part of this bill. The said Louisville, New Orleans & Texas Railway Company, pursuant to its said agreement of purchase, did afterwards purchase from the holders thereof, the said $1,250,000.00 of outstanding bonds of the said Natchez, Jackson & Columbus Railroad Company, paying therefor $890,000 of its own first-mortgage four per cent. gold bonds, payable to bearer in the city of New York, which did constitute a mortgage on its entire line of railroad, from Memphis to New Orleans; the said $1,250,000.00 of outstanding bonds of the said Natchez, Jackson & Columbus Railroad Company so purchased not being cancelled by said purchase, but being, pursuant to its contract and agreement, placed in trust as collateral security for the payment of the coupons and principal of the entire issue of the first-mortgage bonds and of the second mortgage bonds of the said Louisville, New Orleans & Texas Railway Company: such method being adopted in order to give the holders of the Louisville, New Orleans and Texas Railway bonds a mortgage and lien upon the property of the Natchez, Jackson & Columbus Railroad Company as security for their holdings, said property having been acquired and purchased in large part, as stated above, by the issuance of bonds of the Louisville, New Orleans & Texas Railway Company.

XI.

Your orator further states that by an act entitled "An act incorporating the Yazoo & Mississippi Valley Railroad Company and declaring its powers," approved February 17, 1882, the said legislature of the State of Mississippi did incorporate your orator as a Mississippi corporation; and that on the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company and your orator, pursuant to authorities conferred upon them by their respective charters, hereinbefore stated, effected a consolidation whereby the existence of the Louisville, New Orleans & Texas Rail-

way Company was merged into that of the Yazoo & Mississippi Valley Railroad Company, and all of the property, real and personal, and all of the rights, franchises, privileges and immunities of the said Louisville, New Orleans & Texas Railway Company, including as part thereof all the property, real and personal, all of the rights, franchises, privileges and immunities that had been of the Natchez, Jackson & Columbus Railroad Company were transferred to and became the property, rights, privileges, franchises and immunities of your orator.

Amongst the rights, franchises, privileges and immunities aforesaid so vested in your orator by such consolidation, were the contract rights aforesaid, originally of the Natchez, Jackson & Columbus Railroad Company, under and by virtue of the said section
9 21 of the Mobile & Northwestern charter in respect to taxes, and the appropriation of an amount equal thereto by the said State of Mississippi, assessed against the property that had been property of the Natchez, Jackson & Columbus Railroad Company; and were also the rights thereto of the Louisville, New Orleans & Texas Railway Company. And amongst the rights, franchises, privileges and immunities aforesaid so vested in your orator by such consolidation, were the contract rights aforesaid originally of the Louisville, New Orleans & Texas Railway Company, under and by virtue of the said section 21 aforesaid of the Mobile & Northwestern charter, in respect to taxes and the appropriation of an amount equal thereto by the said State of Mississippi, assessed against the property that had been the property of the Louisville, New Orleans & Texas Railway Company.

And your orator, from the date of such consolidation, until this day, has, by virtue of the contracts hereinbefore set forth, been entitled to the full exercise and enjoyment of the rights aforesaid by the legislation aforesaid contracted and conferred.

XII.

Your orator now shows that in the year 1898, proceeding under the provisions of the revenue chapter of the Annotated Code of 1892, and the laws amendatory thereof, the State railroad commission, as assessors of railway property, did assess for taxation the property aforesaid, being property that was originally of the Natchez, Jackson & Columbus Railroad Company, and also property that was originally of the Louisville, New Orleans & Texas Railway Company as aforesaid, and did fix the amount of privilege taxes due and payable to the State on account of ownership by your orator of such respective railroad properties, and the operation of the same.

And your orator avers that under its contract right as aforesaid, derived as aforesaid, it had the right to discharge and pay off said taxes, both ad valorem and privilege, so ascertained and fixed, by paying during the current year a sum of money on account of the construction debt of the Natchez & Jackson railroad, equal to the taxes assessed on account thereof, and by tendering to the various sheriffs of the respective counties charged by law with the duty of collecting taxes in and for those counties, the affidavits prescribed

and required by the said section 21, extended to the Natchez & Jackson Railroad Company and to the Louisville, New Orleans & Texas Railway Company as aforesaid.

XIII.

Your orator further avers that during the year 1898, it has extinguished and paid construction debt within the scope and meaning of the said statute, of the railroad from Natchez to Jackson as aforesaid to an amount equal to the amount of taxes, both ad valorem and privilege, so assessed against it on account of its ownership of such property, in full and exact conformity with the provisions of said statute, and it has tendered to the respective sheriffs aforesaid, the statutory affidavits prescribed and required in respect to its enjoinment of such contract under said statute as the owner of the property last aforesaid.

XIV.

Your orator further avers that during the year 1898 it has extinguished and paid construction debt within the meaning and scope of the said statute, of the railroad that was the property of the Louisville, New Orleans & Texas Railway Company as aforesaid, an amount equal to the amount of taxes, both ad valorem and privilege, so assessed against it on account of its ownership of said property, in full and exact conformity with the provisions of said statute, and it has tendered to the respective sheriffs aforesaid, the statutory affidavits prescribed and required in respect to its enjoyment of such contract right under said statute as the owner of the property last aforesaid.

XV.

Your orator now avers, that disregarding the contract rights as aforesaid of your orator in the premises, and repudiating the same, the said sheriffs of the said counties respectively, have refused to accept the said affidavits and to give to your orator the receipts provided for in said statutes, and insist that your orator shall pay off such taxes so assessed in currency ; and this defendant, the Hon. Wirt Adams, State revenue agent, also disregarding the said contract rights of your orator and repudiating same, threatens to sue in his capacity as State revenue agent to collect the said taxes in currency, the object and intent of said collecting agents and officers of the State of Mississippi being to deny your orator's rights in the premises as hereinbefore set out, and thereby to deny your orator the benefit of the appropriation heretofore made of such taxes towards the liquidation and discharge of the construction debt of the two railroad properties respectively as contracted for, and to force the payment of all such taxes so assessed in currency, whereby your orator shall finally lose the same.

XVI.

Your orator is a tax-payer of the State of Mississippi and a tax-payer of the various counties hereinbefore named of said State

within the contemplation and meaning of the statute of the State of Mississippi which authorizes the injunction of attempts to
11 collect taxes not authorized by law. And your orator avers that it is informed, and it so states, that the said sheriffs as tax collectors have the power to force the payment of said taxes by seizure of the property of your orator, in the manner prescribed by law, if the same be not paid by your orator pursuant to their claims and demands, and that they will seize the same in order to enforce the demands, and your orator is thereupon and thereby threatened with a multiplicity of suits and seizures, including the threatened suit of the State revenue agent, brought for the purpose of unlawfully forcing the payment of said taxes in currency, contrary to your said orator's contract rights.

XVII.

Your orator further states that under and by virtue of the laws of the State of Mississippi, said assessments of taxes when made do constitute a lien upon the railroad property of your orator aforesaid in said State, preferential in law to all mortgages and other liabilities, and do cast a cloud upon the title of your orator, to said property, to the great injury of your orator, and to the injury of the holders of your orator's mortgage bonds; that such lien so imposed has been, in law and equity, by the payments made by your orator on account of construction debt as aforesaid, by the tender of the said affidavits as aforesaid, satisfied and discharged in full, but that the claim of the said sheriffs as tax collectors and of the said State revenue agent, as the fiscal officers of the State and the various counties and municipalities therein, do constitute a continuing cloud upon your orator's title to said property, contrary to good faith and equity, which should be extinguished and removed.

XVIII.

Your orator further shows that it cannot even pay these taxes under protest and sue to recover them back without being subjected to the burden of a multiplicity of suits as aforesaid; furthermore, that even if your orator were to pay the same under protest and sue to recover the same back and should recover judgment for the same after undergoing the burden of such multiplicity of litigation, because of the peculiar constitution of municipalities and counties, it is quite doubtful if the judgments recovered against them could ever practically realize a return of the said taxes, or realize such a return without a very great reduction in the practical results because of costs and expenses; and so far as such a suit against the State of Mississippi is concerned, a judgment against said State would doubtless be worthless and of no value, since an execution cannot be had against the same in any form, and it would
12 be purely and wholly optional with the legislature whether it would or would not ever pass a bill of appropriation to return such moneys.

Wherefore, your orator is, and would be without any effectual remedy at law, and is relievable only in the courts of equity.

XIX.

Your orator states that the amount of taxes so unlawfully demanded from your orator on account of its ownership of such property is not exactly known to your orator, but it exceeds the sum of $100,000, computing both ad valorem and privilege taxes, and it exceeds the sum of $2,000 in each of said counties hereinbefore named, because of taxes ad valorem and privilege assessed and payable against, and because of your orator's ownership of such property and the operation of its railroad in each of said counties.

XX.

Your orator now avers that the said demands of the said defendants and their threatened action in the prosecution thereof are asserted under and are taken under the revenue laws of the State of Mississippi, passed by the legislature of said State in the Annotated Code, and of various acts amendatory thereof at subsequent sessions of the legislature, and the act of 1894, defining the office and powers of the State revenue agent, all of which were enacted and passed subsequent to the acts hereinbefore cited as investing your orator and the said Natchez, Jackson & Columbus Railroad Company and the said Louisville, New Orleans & Texas Railway Company with their rights in the premises as aforesaid, and such demands and such threatened action on the part of the defendants herein are in contravention of the said contract rights of your orator, and in violation of section 10, art. 1 of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract.

XXI.

Your orator charges that the said defendants pretend that the said acts of 1870 and 1882 and 1884, in and so far as they conferred the rights hereinbefore detailed upon the said Natchez, Jackson & Columbus Railroad Company, and the said Louisville, New Orleans & Texas Railway Company, and your orator, were repealed by the revenue laws of 1886; and also that if not repealed by the revenue laws of 1886, they were repealed by the provisions in respect to the revenue, of the Annotated Code of 1892,—all of which your orator denies, and states that the said acts of the legislature of the State of Mississippi in undertaking to repeal the same, if
13 they do so undertake, are violative as aforesaid of the said section 10, art. 1 of the Constitution of the United States, forbidding any State to pass any law impairing the obligation of a contract.

XXII.

The said defendants, your orator charges, also pretend that the contract rights hereinbefore detailed, were waived and lost by the consolidation hereinbefore mentioned which took place on the 24th day of October, 1892, between the Louisville, New Orleans & Texas Railway Company and your orator. But this pretense also your orator denies, and avers that about the month of January, 1893, one

Lambert, who was then sheriff and tax collector in and for the county of Adams, aforesaid, undertook to collect from your orator, States and county taxes on the property of your orator in Adams county, which had formerly been property of the Natchez, Jackson & Columbus Railroad Company, by proceeding under the statute of the State then existing. And your orator in conjunction with the said Natchez, Jackson & Columbus Railroad Company, did file their two bills of injunction against the said Lambert to enjoin the collection of said taxes, one bill being to enjoin the collection of ad valorem taxes for the years 1891 and 1892, and the other bill being to enjoin the collection of privilege taxes for the said years. The said Lambert resisted the said bills of injunction, acting in his capacity as sheriff and tax collector of said county charged with the duty of collecting both State and county taxes, and the chancellor dismissed the said bills of injunction, from which decree of dismissal your orator and the said Natchez, Jackson & Columbus Railroad Company appealed to the supreme court of the State of Mississippi, upon which appeal, the supreme court did reverse the decision of the chancellor in the court below and sustain the right of your orator to the continued enjoyment of the provisions of said section 21, of the Mobile & Northwestern Railroad charter as extended to the Natchez, Jackson & Columbus Railroad Company, notwithstanding such consolidation of October 24th, 1892.

Your orator further states that the effect of such consolidation was fully presented and was controverted, and it was urged upon the said supreme court by the honorable attorney general of the State, and the said supreme court did expressly adjudicate and pass upon the same, and held that the effect of such consolidation was not to create a new company, and was not to bring the property of your orator subject to the revenue provision embodied in section 180 and 181 of the constitution of 1890, but that the same did operate as a mere merger, whereby the existence of the Louisville, New Orleans & Texas Railway Company was merged into that of your orator, while the existence of your orator continued unbroken,
14 and no new company was formed. And your orator hereby sets up and pleads sueh decision as *res adjudicata* in its favor as to the effect and operation of such consolidation, the same having been expressly controverted and decided in the said Lambert case, in a suit to which your orator was a party on the one side, and to which an officer of the State, lawfully authorized to collect taxes, and representing the State, was a party on the other.

XXIII.

Your orator further states that the said defendants pretend that the said rights hereinbefore set forth of your orator, derived as aforesaid from the said Louisville, New Orleans & Texas Railway Company were lost by the consolidation of October 24th, 1892, because of the operation of sections 180 and 181 of the constitution of the State of Mississippi, promulgated November 1st, 1890; and this your orator denies, and avers that the said constitution of the State of Mississippi, being adopted since the said contract rights

were vested as aforesaid in those companies from which your orator derived the same, were protected by the section 10, act. 1 of the Constitution of the United States, and could not be impaired by the said constitution of November 1st, 1890, of the State of Mississippi, and your orator invokes the protection and benefit in this case of the said section 10, art. 1 of the Constitution of the United States.

XXIV.

In order that this controversy may be narrowed to its true dimensions, your orator states further herein that it does not claim, and has never claimed that the contract rights hereinbefore set forth applied to such parts of the railroad of your orator as were assessed by the board of railroad assessors under the following descriptions:

1st. It does not apply to the assessments made against the Helena branch.

2nd. It does not apply to the assessments made against that portion of the Riverside division denominated, "the special charter."

3rd. It does not apply to that portion know as the "Bayou Sara branch."

On these three pieces of your orator's road, since they were not constructed either by the Natchez, Jackson & Columbus Railroad Company, nor under the charter of the Louisville, New Orleans & Texas Railway Company, your orator has always admitted its liability to pay taxes assessed against the same in the ordinary manner, and has claimed no benefit of its contract as hereinbefore set forth, in respect to them.

15 Your orator further states that it has paid such taxes in currency for this year, and your orator does not understand that there is any controversy over these facts between the defendants and itself in respect to those three portions, or subdivisions or branches of its road, and it is not intended by this bill to seek any protection in respect to them.

XXV.

The premises considered, and that justice may be done, your orator prays that the writ of subpœna may issue for the said defendants, to wit: Wirt Adams, State revenue agent, in and for the State of Mississippi; and W. S. Wissenger, sheriff of De Soto county, and F. L. Hope, sheriff of Tunica county, and F. B. Fitzgerald, sheriff of Coahoma county; and R. M. Edwards, sheriff of Bolivar county; and J. B. Hebron, sheriff of Washington county; and C. H. Walton, sheriff of Sharkey county; and R. W. Smith, sheriff of Issaquena county; and Dan. B. Hebron, sheriff of Warren county; and R. C. McCay, sheriff of Claiborne county; and C. C. Coffey, sheriff of Jefferson county; and J. R. Jones, sheriff of Franklin county; and J. B. Turnipseed, sheriff of Amite county; and J. M. Sessions, sheriff of Wilkinson county; and J. H. Sullivan, sheriff of Tallahatchie county; and J. B. Humphreys, sheriff of Le Flore county; and S. Duncan Baker, sheriff of Adams county; and W. T. Ratliff,

sheriff of Hinds county; and that the said defendants may be required to answer this bill fully and at large as if thereunto specifically interrogated, their oaths to such answer being, however, hereby expressly waived.

Your orator prays that pending this litigation, your honors will issue a writ of injunction, and that on final hearing your honors will issue a perpetual injunction to the effect following, to wit:

That the said defendants be and they are enjoined from bringing any suits against your orator for the recovery of said taxes, or seizing your orator's property under any distress warrants otherwise, or taking any steps or proceedings whatever for the collection and recovery of such taxes; and that on final hearing, your honors will further adjudge and decree that by the payment of the construction debts as aforesaid, and the tender of affidavits as aforesaid, the liability of your orator and of your orator's property for taxes as afroesaid, has been fully met and discharged, and that the assessment so made, and the levies made pursuant thereto, shall be satisfied in full, and all clouds following or arising therefrom be removed from the title of your orator to its property as aforesaid, and for such other, further and general relief as to your honors may seem proper and meet.

16 And your orator as in duty bound will ever pray.

MAYES & HARRIS,
Solicitors for Complainant.

Personally appeared before me, Geo. R. Gordin, who being by me duly sworn, on oath says that he is the agent of the Yazoo & Mississippi Valley railroad, and that the averments of the foregoing bill, such as are made on information and belief, he believes to be true, and such as are made on information and knowledge are true.

G. R. GORDIN,
Ag't Y. & M. V. R'y Co.

Sworn to and subscribed before me this 16th day of December, 1898.

F. B. NEAL,
[SEAL.] *Clerk of the Circuit Court of Hinds County, Mississippi, and ex Officio Notary Public.*

[5 2c. U. S. documentary stamps.]

Filed Dec. 26, 1898.

L. B. MOSELEY, *Clerk.*

EXHIBIT TO BILL.

This indenture, made and entered into this 28th day of March, 1890, by and between the Natchez, Jackson & Columbus Railroad Company of the first part, and the Louisville, New Orleans and Texas Railway Company, of the second part—witnesseth:

That the party of the first part, in consideration of the sum of one hundred and eighty thousand dollars, lawful money of the

United States, to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and conveyed, and hereby grants, bargains, sells, assigns, transfers and conveys unto the party of the second part, its successors and assigns forever, all the railroad and other property of the party of the first part lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities unto the said party of the first part appertaining or belonging.

To have and to hold to the said party of the second part, its successors and assigns forever, subject, however, to the existing mortgage from the said party of the first part to the Farmers' Loan and Trust Company, trustee, dated September 1st, 1882, securing outstanding bonds of the party of the first part, to the amount of their par or face value of not exceeding one million two hundred and fifty thousand dollars, and subject to the current interest thereon.

And in consideration of the premises, the party of the first part has undertaken, covenanted and agreed and hereby undertakes, coven- and agrees to and with the party of the second part to provi- or the interest which matured on or prior to March 1, 1890, on bonds secured by the mortgage above referred to, 17 and to provide for the payment of all other unpaid indebtedness and obligations of the party of the first part accruing from and after May 1st, 1889.

In witness whereof, the party of the first part has caused these presents to be executed on its behalf by its president and its corporate seal to be hereunto affixed and attested by its secretary, the day and year first above written.

NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY,
By T. J. NEWMAN, *President.*
[SEAL.] JOS. T. PENTON, *Secretary.*

STATE OF MISSISSIPPI, }
Adams County. }

Personally appeared before me, J. Chas. Carson, a justice of the peace, and *ex officio* notary public, in and for the county and State aforesaid, the within-named J. T. Nicholl and Jos. T. Penton, who being by me duly sworn, deposed, say and acknowledge that they signed, sealed and delivered the foregoing deed on the day and year therein named, as the act and deed of the Natchez, Jackson & Columbus Railroad Company, and the said T. J. Nicholl deposing and acknowledging that he signed and delivered the said deed as president of said company, and the said Jos. T. Penton deposing and acknowledging that he signed said deed and affixed the corporate seal of said company to said deed by authority of a resolution of the board of directors of said company, and as the secretary of said company, and the said T. J. Nicholl and Jos. T. Penton further depose, say and acknowledge that they know the corporate seal of said Natchez, Jackson & Columbus Railroad Company, and that

the seal so affixed to said deed is the seal of said Natchez, Jackson and Columbus Railroad Company, and was so affixed by the order of the board of directors of said company.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 28th day of March, A. D. 1890.

J. CHAS. CARSON,
J. P. and ex Officio Notary Public.

Fiat for Injunction.

No. 561.

18 The clerk of the circuit court, southern district Mississippi, will, upon the complainants herein entering into bond with sureties to be approved by him in the sum of five hundred dollars, conditioned and payable according to law, issue an order addressed to the defendants herein, and each of them, restraining them from further proceeding to collect taxes mentioned in the bill of complaint of the complainant herein, either by suit or otherwise, or proceeding against the property of said complainant by suit, seizure or distress, or otherwise, and commanding and directing the said defendants to appear at the city of Jackson on the 3rd Monday in January, 1899, to then and there show cause, if they have any, why a perpetual injunction shall not be granted against them as prayed herein.

December 17, 1898.

H. C. NILES, *Judge.*

Know all men by these presents, that we, The Yazoo & Mississippi Valley Railroad Company, as principal, and R. W. Millsaps and John Hart, as sureties, do hereby acknowledge to owe unto Wirt Adams, State revenue agent in and for the State of Mississippi, and W. S. Wissenger, sheriff of De Soto county, Mississippi; and F. L. Hope, sheriff of Tunica county, Mississippi; and F. B. Fitzgerald, sheriff of Coahoma county, Mississippi; and R. M. Edwards, sheriff of Bolivar county, Mississippi; and J. B. Hebron, sheriff of Washington county, Mississippi; and R. C. McKay, sheriff of Claiborne county, Mississippi; and J. R. Jones, sheriff of Franklin county, Mississippi; and J. B. Turnipseed, sheriff of Amite county, Mississippi; and J. M. Sessions, sheriff of Wilkinson county, Mississippi; and J. H. Sullivan, sheriff of Tallahatchie county, Mississippi; and J. B. Humphreys, sheriff of Leflore county, Mississippi; and S. Duncan Baker, sheriff of Adams county, Mississippi; and W. T. Ratliff, sheriff of Hinds county, Mississippi, the sum of five hundred dollars, for the payment of which well and truly to be made, we do hereby bind ourselves, our successors, our heirs, administrators and assigns.

Witness our signatures, this the 26th day of December, 1898.

The condition of the above obligation is such that, whereas the principal above named has filed its bill in the United States circuit court in and for the southern district of Mississippi sitting at Jackson, to enjoin the obligees above named from prosecuting any suits

or levying any distress warrants, or taking any other steps to enforce the collection of certain taxes assessed by the State railroad assessors, and levied thereupon by the State and the counties aforesaid against the said principal, all of which is more fully set forth in the said bill of complaint.

19 And whereas a restraining order has been granted by the Hon. Henry C. Niles, judge of the district court.

Now, therefore, if the said railroad company above named shall pay all costs of said injunction and in all other respects discharge and satisfy in full such judgment as the court shall pronounce therein, in the event that the said injunction shall be dissolved, then this obligation to be void and of no effect. Otherwise to remain in full force and effect.

THE YAZOO & MISSISSIPPI
VALLEY R. R. CO.,
By MAYES & HARRIS, *Its Att'ys.*
R. W. MILLSAPS.
JOHN HART.

I hereby approve the foregoing bond, this 30 Dec'r, 1898.
L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA, }
Southern District of Mississippi. }

In the Circuit Court of the United States for said District. In Chancery.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY }
vs.
WIRT ADAMS, State Revenue Agent, ET AL. }

To Wirt Adams, State revenue agent for Mississippi; and W. S. Wissenger, sheriff of De Soto county, Mississippi; and F. L. Hope, sheriff of Tunica county, Miss.; and F. B. Fitzgerald, sheriff of Coahoma county, Miss.; and R. M. Edwards, sheriff of Bolivar county, Miss.; and J. B. Hebron, sheriff of Washington county, Miss.; and C. R. Walton, sheriff of Sharkey county, Miss.; and R. C. McKay, sheriff of Claiborne county, Miss.; and C. C. Coffee, sheriff of Jefferson county, Miss.; and J. R. Jones, sheriff of Franklin county, Miss.; and R. W. Smith, sheriff of Issaquena county, Miss.; and J. B. Turnipseed, sheriff of Amite county, Miss.; and J. M. Sessions, sheriff of Wilkinson county, Miss.; and J. H. Sullivan, sheriff of Tallahatchie county, Miss.; and Dan. B. Hebron, sheriff of Warren county, Miss.; and J. B. Humphreys, sheriff of Leflore county, Miss.; and S. Duncan Baker, sheriff of Adams county, Miss.; and W. T. Ratliff, sheriff of Hinds county, Mississippi—these:

Whereas it has been representad to us, in our circuit court of the United States for the southern district of Mississippi, sitting at Jackson, Mississippi, on the part of the Yazoo & Missis-

20 sippi Valley Railroad Company, complainants, that it has lately exhibited its bill of complaint in our said circuit court

for the district aforesaid against you the said Wirt Adams, State revenue agent for Mississippi, and the foregoing-named sheriffs of the counties of Mississippi hereinabove named, defendants to be relieved touching the matters therein complained of; in which bill it is stated among other things, that you with others are about to take measures and steps to the great injury of the said complainant touching matters set forth in the said bill, and that your actions and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of particular matters in the said bill set forth, do strictly command and enjoin you and each of you the said Wirt Adams, State revenue agent, and S. Wissenger, sheriff of De Soto county, Miss.; and F. L. Hope, sheriff of Tunica county, Miss.; and F. B. Fitzgerald, sheriff of Coahoma county, Miss.; and R. M. Edwards, sheriff of Bolivar county, Miss.; and J. B. Hebron, sheriff of Washington county, Miss.; and C. H. Walton, sheriff of Sharkey county, Miss.; and R. W. Smith, sheriff of Issaquena county, Miss.; and Dan B. Hebron, sheriff of Warren county, Miss.; and R. C. McKay, sheriff of Claiborne county, Miss.; and C. C. Coffee, sheriff of Jefferson county, Miss.; and J. R. Jones, sheriff of Franklin county, Miss.; and J. B. Turnipseed, —, and J. M. Sessions, sheriff of Wilkinson county, Miss.; and J. H. Sullivan, sheriff of Tallahatchie county, Miss.; and J. B. Humphreys, sheriff of Leflore county, Miss.; and S. Duncan Baker, sheriff of Adams county, Miss.; and W. T. Ratliff, sheriff of Hinds county, Mississippi; each and every of you under the pains and penalties which may fall upon you or all of you in case of disobedience, that you do absolutely desist and refrain, as follows:

That you and each of you desist and refrain from further proceedings to collect taxes mentioned in the bill of complaint of the complainants herein, either by suit or otherwise or proceedings against the property of said complainants by suit, or distress, or otherwise until the further orders of said court.

And you are further commanded and directed to appear in the city of Jackson in the said district on the 3rd Monday in January, 1899, to then and there show cause, if any you have, why a perpetual injunction should not be granted against you as prayed in said bill of complaint.

Witness the Honorable M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court hereto affixed, at Jackson, in said district, this 26th day of December, 1898.

[SEAL.] L. B. MOSELEY, *Clerk.*

21 Executed the within process this day upon the defendants, Wirt Adams and W. T. Ratliff, in person by handing to each of them a true copy thereof this December 27, 1898.

Plaintiff's attorney advises that the other defendants will voluntarily enter their appearance in court.

F. W. COLLINS,
U. S. Marshal,
By R. O. EDWARDS, *Deputy.*

In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Answer of Sheriff of Wilkinson County.

I, J. M. Sessions, sheriff and tax collector of said Wilkinson county, and one of the defendants in this suit, in answer to the bill, say that I have not seized or levied on, nor am I about to seize or levy on said railroad, or property for taxes, and have not given said railroad company or its agents or officials any reason to believe that I was, by threats or otherwise, and the application for an injunction against me in this case is unnecessary and uncalled for.

JAS. M. SESSIONS,
Sheriff and Tax Collector of Wilkinson County, Mississippi.

Filed Jan. 17, 1899.

L. B. MOSELEY, *Clerk.*

Motion to Discharge Restraining Order.

In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Plaintiff,
vs.
WIRT ADAMS, State Revenue Agent, ET AL., Defendant. } No. 561.

Now comes the defendants, Wirt Adams, State revenue agent of the State of Mississippi, and W. S. Wissenger, sheriff and tax collector of De Soto county, F. L. Hope, sheriff and tax collector of Tunica county, F. P. Fitzgerald, sheriff and tax collector of Coahoma county, R. M. Edwards, sheriff and tax collector of Bolivar county, C. H. Walron, sheriff and tax collector of Sharkey
22 county, R. M. Smith, sheriff and tax collector of Issaquena county, D. N. Hebron, sheriff and tax collector of Warren county, R. C. McCay, sheriff and tax collector of Claiborne county, C. C. Coffey, sheriff and tax collector of Jefferson county, J. P. Jones, sheriff and tax collector of Franklin county, J. B. Turnipseed, sheriff and tax collector of Amite county, J. M. Sessions, sheriff and tax collector of Wilkinson county, J. B. Humphries, sheriff and tax collector of Leflore county, J. H. Sullivan, sheriff and tax collector of Tallahatchie county, S. Duncan Baker, sheriff and tax collector of Adams county, and W. T. Ratliff, sheriff and tax collector of Hinds county, J. B. Hebron, sheriff and tax collector of Washington county, in said State, and on the disclaimers of said sheriffs and tax collectors herewith tendered on the face of the bill move

the court to discharge the restraining order heretofore granted and quash the restraining or injunction writs, and they object to the granting or issuance of any injunction against them or either of them, and said revenue agent further objects to the granting or issuance of any injunction in the case, because:

1st. On the disclaimers of the sheriffs and tax collectors hereto attached and herewith tendered the granting of an injunction would be unnecessary and improper.

2nd. The said revenue agent has no authority to distrain, levy on or sell anything, but only to sue in a court of competent jurisdiction for said taxes, and an injunction against him is a suit against the State of Mississippi, and forbidden by the 11th amendment to the Constitution of the United States.

3rd. This court has no jurisdiction.

4th. Plaintiff is not entitled to an injunction or any relief on the facts stated in its bill.

CRITZ, BECKET & KIMBROUGH,
CALHOUN & GREEN,
Solicitors for Defendants.

UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS.

Motion for Temporary Injunction.

23 The complainant in the above-entitled cause, The Yazoo & Mississippi Valley Railroad Company, moves the court to order the issuance of a temporary injunction until the final hearing and the further order of this court, as prayed for in the original bill.

MAYES & HARRIS,
Solicitors for Compl't.

Filed and entered January 18, 1899.

L. B. MOSELEY, *Clerk.*

Judge's Memorandum of Evidence.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent.

1. Miss. Valley Co. charter.
2. Copy record Mississippi Mills *vs.* Cook.
3. Record in Lambert case.
4. Certified copy of opinion of supreme court Nov. 22, '98.
5. Copy of opinion of June 20, 1898.

In the Circuit Court of the United States for the Southern District of Mississippi.

YAZOO & MISSISSIPPI VALLEY RAILROAD Company
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561. In Equity.

Agreement of Counsel.

It is agreed:

1. That the hearing of the motions to discharge the restraining order, and for an injunction, was postponed from time to time by agreement, from September, 1898, to January, 1899; and that the case was heard on said motions notice being waived, in January, 1899, by agreement, and heard by agreement, together with the previous cases Nos. 559 and 560.

2. That in regard to the record in Miss. Mills *vs.* Cook, sheriff, that only the original bill need be copied in the transcript, and it is agreed that this bill was demurred to; the demurrer was sustained by the chancellor March 12th, 1878, and appeal to supreme court duly taken; and that the printed report of said cause in 56 Miss., p. 40, may be treated as the rest of said record; and that it was decided at April term, 1878, of said court.

24

3. That as to the record in The Natchez, Jackson & Columbus Railroad Company, *et al.*, *vs.* Lambert, sheriff, that only the original bill and the affidavits, Exhibits "D" and "E" thereto, and the demurrer thereto need be copied in the transcript, and that to said bill there was a plea of *res adjudicata*, supported by a record, wherein The L., N. O. & T. R. R. Co., as complainant, had sought to enjoin the said Lambert from subjecting its profits, acquired from N., J. & C. R. R. Co. to the payment of State and county taxes, upon substantially the same averments as in bill in N., J. & C. R. R. Co. *vs.* Lambert, *supra*, except that it was averred that the taxes had been paid for 1891 by affidavit of proper officers of the L., N. O. & T. R. R. Co., of application of the amount of said taxes on the debts of construction of said L., N. O. & T. R'y Co.; that the demurrer was sustained on March 23rd, by the chancellor, and the cause was duly appealed to the April term, 1893, returnable April 17, 1893, and was decided by the supreme court at said term on the — day of ——, 1893; and that the printed report of said case in 70th Miss., p. 779, may be treated as the rest of the said record.

4. That the certified copies of the decisions of the supreme court of Mississippi, rendered June 28th, 1898, and Nov. 22nd, 1898, in the case styled "Wirt Adams, State revenue agent, appellant, *vs.* Yazoo & Miss. Valley R. R. Co., *et al.*, appellees," need not be copied in the record, but may be used as published in the "Mississippi Decisions" and in connection with the briefs of counsel.

5. That only the answer of J. M. Sessions need be copied in the transcript; that each and every other tax collector made defendant to the bill filed an answer in the identical terms of said Sessions answer.

6. That only one restraining order need be copied, and that upon each of the other defendants identical re-training orders were duly served as that copied.

F. A. CRITZ AND
R. C. BECKETT,
S. S. CALHOUN AND
MARCELLUS GREEN,
Solicitors for Appellees.
EDWARD MAYES,
Attorney for Appellant.

25 S. B. No. 186.

An act to incorporate the Mississippi Valley Company.

SECTION 1. Be it enacted by the legislature of the State of Mississippi, That J. B. Fant, Thomas J. Malone, A. J. McConico, A. M. West, G. Burgland, R. P. Neiley and H. L. Duncan, and their associates, successors and assigns be and they are hereby incorporated under the name and style of the "Mississippi Valley Company," and by that name, style and title shall have perpetual succession, and all the privileges, franchises and immunities by law incident to a corporation, may sue and be sued, plead and be impleaded, complain and defend in all courts of law and equity, and may purchase, receive, hold and enjoy, to them, their successors and assigns, all such lands, tenements, leasehold estates and hereditaments, goods and chattels, securities, and estates, real, personal and mixed, of what kind and quality soever, and may sell and convey the same at pleasure, and shall also be authorized to erect residences, depots, engine-houses, tracks, shops and other improvements necessary for the purposes of the said corporation as hereafter defined by the second section of this act; and the same may, from time to time sell, convey, mortgage and submortgage, encumber, charge, pledge, grant, lease, sublease, alien and dispose of, and also make and have a common seal, and the same to alter and renew at pleasure, and ordain, establish and put in execution such by-laws or ordinances, rules and regulations, as may be necessary or convenient for the government of the said corporation, not being contrary to the constitution and laws of this State, and generally may do all and singular the matters and things which to them shall appertain to do for the well-being of the said corporation and the management and ordering of the affairs and business of the same.

SECTION 2. Be it further enacted, That the corporation hereby created shall have power to contract with any person or persons, firms, corporations or any other parties whomsoever, formed or existing, or that may hereafter exist in any way; that said parties or any of them may have authority to do, to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, live stock and passengers and any other traffic by land or water from or to any part of the United States or the territories thereof, and the

said company shall also have power and authority to supply or furnish all needful material, labor, implements, instruments
26 and fixtures of any and every kind whatsoever, on such terms and conditions as may be agreed upon by and between the parties respectively, and also to purchase, erect, construct, maintain or conduct in its own name, and for its own benefit or otherwise, any such works, public or private, as they may by law be authorized to do, (including also herein lines for telegraphic communication) and to aid, co-operate, and unite with any other company, person, or firm in so doing.

SECTION 3. Be it enacted further, That the company hereby created shall also have the power to make purchases and sales, for investments in the bonds, stocks and securities of the companies and to make advances of money and of credit to other companies, and to aid in like manner contractors and manufacturers, and to receive and hold on deposit, or as collateral or otherwise, any estate or property, real or personal including the notes, stocks, obligations and accounts of individuals and companies and the same to purchase, collect, adjust and settle, and also to pledge, sell and dispose thereof on such terms as may be agreed between them and the parties contracting with them and also to endorse and guarantee the payment of the ob igations of other corporations, firms and individuals, and to assume, become responsible for, execute and carry out any contracts, leases or subleases made by any company, to or with any other company or companies, individuals or firms whatsoever, provided that nothing herein contained shall be construed as to give the said corporation any banking privileges or franchises, or the privileges of making, issuing or putting in circulation any notes, bills, or other paper of any o her bank to circulate money provided, that nothing herein contained shall be construed as preventing this company from availing themselves of the provisions of the act of Congress for a national system of banking.

SECTION 4. Be it enacted further, That the company hereby created shall also have power to enter upon and occupy the lands of individuals or companies (on making payment therefor or giving security according to law) for the purpose of erecting, constructing, maintaining or managing any public work such as is provided for or mentioned in the second section of this act, and to construct and erect such works thereon and also buildings, improvements, structures, roads or fixtures as may be necessary or convenient for the purpose of said company, under the powers herein granted, and to purchase, make, use and maintain any works or improvements, connecting, or intended to be connected with the work of the said company, and to merge, consolidate or unite with the said company the improvements, property and franchises of any other company or companies on such terms and conditions, as the said company may agree upon, and to fix and regulate the tolls or charges
27 to be charged or demanded for any freight, property or passengers traveling over or passing over any improvement erected, managed or owned by the said company on any merchandise or property transported over any road whatsoever by said company,

and to make from time to time dividends from the profits made by said company. Any railroad or the several railroads managed by said company shall be taxable as provided in their charter or other laws of the State and in proportion to their length within this State, respectively, and the property of said "Mississippi Valley Company" that is within the limits of the State, and all its income derived from its business within this State, shall forever be subject to taxation, the same as that of individuals, but its property beyond the limits of this State, and all its income derived from its business beyond the limits thereof shall not be subject to taxation nor shall it at any time be subject to a privilege tax, or any other tax, except as is stipulated in the constitution of the State or as provided in the acts of Congress.

SECTION 5. Be it further enacted, That the capital stock of said company shall consist of one thousand shares of the value of fifty thousand dollars each, being fifty thousand dollars, and with the privilege of increasing the same by a vote of the holders of a majority of the stock present at any annual meeting or special meeting to such an amount as they may from time to time deem needful, and the corporators or any three of them named in the first section of this act, shall have power to open books for subscription at such times and places as they may deem expedient and when not less than five hundred shares shall have been subscribed and twenty per centum thereon shall have been paid in.

The shareholders may elect not less than three nor more than nine directors to serve until the next annual election or until their successors shall be duly elected and qualified, and the directors so elected may and they are hereby authorized and empowered to have and to exercise in the name and in behalf of this company all the rights and privileges which are intended to be hereby given subject only to such liabilities as other shareholders are subject to which liabilities are no more than for the payment to the company of the sums due or to become due on the shares held by them, over and above this no stockholder shall be individually liable and should the capital stock at any time be increased, the stockholders at the time of such increase shall be entitled to a *pro rata* share of such increase, upon the payment of the instalment thereon duly called for and whenever all increase of capital stock is made, a certificate thereof fully executed under the corporate seal of the company and signed by the president and secretary, shall be filed with the secretary of state before the same shall be deemed valid.

28 SECTION 6. Be it further enacted, That the principal office of the said company shall be in Water Valley until otherwise ordered and hereinafter provided, but the directors under such rules and regulations as they may prescribe, may establish branches or agencies in other parts of the State or elsewhere, all of the directors of said company shall be citizens of the United States and reside therein.

SECTION 7. Be it further enacted, That the directors shall be elected annually by the stockholders on the first Tuesday of June of each year, and said directors shall elect from their number at the

first meeting of the board after their election a president, and shall also have power to elect from their number or otherwise a vice-president, a treasurer and secretary, and such other officers, clerks, and agents as the business of the company may require, all elections for directors shall be by ballot and every stockholder shall be entitled to one vote for each share of stock held by him either in person or by proxy, but no person shall be eligible as director who is not a stockholder to the amount of ten shares. At the annual or special meeting a quorum shall consist of stockholders in person or by proxy owning at least one-half the capital stock.

SECTION 8. Be it further enacted, That ten days' notice shall be given by publication in two newspapers published in the State of Mississippi of the time and place of the annual election which election shall be conducted by three stockholders one of which shall act as judge, and the other two as inspectors.

SECTION 9. Be it further enacted, That the board of directors shall make all by-laws necessary for conducting the business of the company, which by-laws shall at all times be accessible to persons transacting business with them. The said directors shall have power by a vote of a majority of their number at any meeting of the board to change the name of the said corporation, and the location of its principal office, or either, but no such name thus adopted shall be deemed valid until a truly certified certificate of its adoption shall be filed with the secretary of state as above provided in case of an increase of stock. The said company shall have, hold and enjoy all the rights, powers, privileges and immunities hereby granted, and such other powers and privileges as belong to corporations by the laws of this State. The directors shall have power to require payment of the amount remaining unpaid on the stock of said company, at such times and in such proportions as they shall think proper, the said assessment to be made as the by-laws of said company shall direct.

SECTION 10. Be it further enacted, That this act take effect and be in force from and after its passage.

29 Passed the house of representatives March 25, 1872.

JOHN R. LYNCH,
Speaker of the House of Representatives.

Passed the senate March 7th, 1872.

JAS. BENNETT,
President of the Senate.

Approved April 2nd, 1872.

R. C. POWERS, *Governor.*

STATE OF MISSISSIPPI,
OFFICE OF SECRETARY OF STATE,
JACKSON, MISS., *June 28th*, 1894.

I, George M. Govan, secretary of state, do certify that the act hereto attached entitled "An act supplemental to and amendatory of an act which passed the senate March 7th, 1872, and passed the house of representatives March 25, 1872, entitled 'An act to incor-

porate the Mississippi Valley Company,'" not yet approved, approved April 2nd, 1872, is a true and correct copy of the original on file in this office.

Given under my hand and the great seal of the State of Mississippi, this 28th day of June, 1894.

GEO. M. GOVAN,
Secretary of State.

STATE OF MISSISSIPPI,
Copiah County.

In the Chancery Court of said County, —— Term, 1878.

THE BILL OF COMPLAINT OF THE MISSISSIPPI MILLS, a Manufacturing Corporation of the State of Mississippi, Existing under that Name by Virtue of a Charter Granted by the Legislature of said State, with its Factories and Domicile in the County Aforesaid, Complainant,

against

WILLIAM W. COOK, Tax Collector of said County, Defendant.

1. The complainant states and shows to the honorable court that the Mississippi mills was incorporated under that name by an act of the legislature of the State passed July 13th, 1871, that certain property which had been owned by a corporation known as the Mississippi Manufacturing Company was sold in proceedings in bankruptcy, against said company, and purchased by certain parties who procured said act of incorporation by which it was provided that the property so purchased should in part represent the capital stock of the corporation at the estimated value, and divided into shares of $1,000 each, and allotted to the several owners of the property so purchased in proportion to their interest therein, and that said owners should subscribe and pay 50 thousand dollars in like proportions, divided into shares of 1,000 dollars, and stock certificates were to be issued to each of said owners according to their interest in the property aforesaid, and subscriptions of money thus making a capital of 250 thousand dollars of paid-up stock. By a provision of the charter aforesaid, the capital stock of said corporation might be increased to 500 thousand dollars; that the property so purchased and converted into stock consisted of an establishment for the manufacture of cotton and other cloth, with other minor kinds of manufacture, to wit, buildings, machinery, and timbered lands surrounding and adjacent to the factory, and subsidiary thereto, and on part of which were erected the various structures needed for the business of manufacturing.

2. Under the charter aforesaid, the corporation, complainant, was duly organized and commenced business, but by an accidental fire, in the year 1873, its buildings and machinery were destroyed and its operations arrested. Before the happening of that event, to wit, in the year 1872, the legislature of the State had by a general law, passed an order to invite and stimulate manufacturing enterprise in the State, and to diversify and multiply its industries, declared that the State hereby agrees with any and all manufacturing com-

panies in this State, whose capital stock shall not be less than ten thousand dollars paid in, and not in operation before the passage of this act that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories or for money borrowed by any manufacturing company, to construct buildings or in paying debts incurred by such companies in constructing or purchasing the same, there are provisions in said act to carry the same into effect, by means of an assessment, to fix the amount of the tax, and a receipt for said taxes as though paid, but no payment in fact was to be made and in lieu of such payment, the company was required to show by affidavit, that the amount assessed had been expended in the manner, or for the purpose designated by the said act; this exemption, complainant is advised it was in spirit and in fact, was to cease when the dividend accruing should exceed 4 per cent. after payment of debts and outlays for machinery, structures, etc.

31 3. The complainant further states that the destruction by fire, as before stated, of the machinery and structures, the essential constituents of the enterprise in which the corporation had embarked while it did not put an end to the existence of the corporate body, arrested its operation and crippled the resources of the corporators, and at the time when the then stockholders were in doubt about the feasibility of any attempt by them to renew the enterprise thus destroyed, the legislature passed the act of 1873, by which the privileges and benefits of the said act of 1872 were extended to and conferred upon the complainant, and the complainant avers that said act was passed to induce a renewal of the enterprise, the utility of which was manifest to that body; and the complainant further avers and charges that the corporators, the then stockholders, were so crippled by the casualty before mentioned, that they were unable and unwilling to replace the machinery and structures destroyed, and that the present stockholders, relying upon the act of 1873 as entitling them to the benefit of the said act of 1872, in respect to the exemption from taxes, and with a view to start the enterprise anew, purchased from the corporators of the Mississippi mills the remnant of property left by the fire which consisted almost entirely of land, constituting the site of the destroyed factory, with the surrounding and adjacent lands, the values of which depended on the locality and its adaption to the purposes of a factory by its abundance of timber for fuel and lumber for the principal enterprise, and in order to supersede the necessity of a new charter, they took from the former stockholders assignments of their stock, except as to Wm. Oliver, who retained his stock, and became a member of the reconstructed corporation, as representing the value of the remnant of property left, and thus becoming stockholders, continued the existence of the organization, being content with the charter existing and the amendment or addition thereto made by the act of 1873, which act was by the new stockholders accepted as part of said charter.

4. The complainant further states and charges that under and after the passage of the said act of 1873, with the guarantee against taxation, except according to the terms of the said act of 1872 the new stockholders, together with Wm. Oliver, of the Mississippi mills, created and put in operation the now existing manufacturing establishment, having purchased the machinery and erected the structures as they now exist by an expenditure of money to that end; that the machinery now in operation is of much greater capacity and the structures larger and more numerous, and that what now exists, and has been put in operation is a manufacturing establishment of the character
32 provided for in the said act of 1872, being a manufactory of cotton and woolen goods with other factories subsidiary to it; that in substance and in fact, and in all except the name and charter organization, it is a manufactory not in operation prior to the passage of said act, and entitled to its benefits, and complainant, is advised even without the express grant in the act of 1873, and although it may not be strictly proper as matter of pleading to make the statement, complainant, nevertheless, avers that the existing establishment is not only a new creation since the date of the act of 1872, but is a realization of the fruits anticipated by its framers. Its capital stock has been increased by about one hundred thousand dollars in paid-up subscriptions, with which machinery has been purchased, and buildings erected. The corporation now employs more than 500 operatives of whom 400 are women and children, and to render these comfortable, and contented, the corporation had erected at great expense cottages and tenements for them on the grounds adjacent to the factory, thus creating a village with its social benefits and with opportunities for education and moral and religious training.

5. The complainant further states that the original corporators purchased a body of land adjacent to the manufactory as it then existed, having in view the needed supply of fuel and lumber in their principal business and not for speculation or profit otherwise, and — to this land by their purchase aforesaid and on which they have erected buildings for the factory offices for the care of the officers of the corporation, and tenements for the operatives, and building for other purposes, and they have added a small outlaying tract of land, but not by way of investment; the complainant appends herewith a statement of the lands including that on which the factory proper, or its structures for machinery are erected, which list will comprise the property assessed to the corporation in the county of Copiah and which has been by the collector treated as exempt, on the corporations making the affidavit, and showing required by the act of 1872, which said corporation has been able truthfuliy to make, as to the taxes and also as to the yield of dividend to the stockholders,—all the said list of lands are as follows, to wit: The W. ½ sec. 3, township 8, range 8 east; all less N. W. ¼ of N. W. ¼ sec. 4, township 8, range 8 east; S. ½ S. W. ¼ and S. W. ¼ S. E. ¼, and S. ½ N. ½ S. E. ¼, and N. E. ¼ N. W. ¼ S. E. ¼, section 28, township 9, range 8 east; S. E. ¼ S. E. ¼, section 32, township 9,

range 8 east, E. ½ and E. ½ of W. ½ less six acres section 33,
33 township 9, range 8 east; all less 55 acres in N. E. ¼ of N. E. ¼ and N. W. ¼ N. E. ¼, east of railroad, and S. E. ¼ of S. E. ¼, section 34, township 9, range 8 east; N. W. ¼ S. W. ¼ and S. W. ¼ N. W. ¼ section 35, township 9, range 8 east; S. E. ¼ N. E. ¼ sec. 7, T. 9, R. 9 east, N. W. ¼ and W. ½ N. E. ¼, and N. E. ¼ N. E. ¼ and N. ½ S. W. ¼ and S. E. ¼ S. W. ¼, and S. W. ¼ S. W. ¼, section 8, township 9, range 9 E.; N. W. ¼ N. W. ¼ sec. 17, township 9, range 9 east; N. E. ¼ of N. E. ¼ sect. 18, township 9, range 8 E.; S. W. ¼ sect. 29, township 9, range 8 east; N. ½ N. W. ¼ and S. E. ¼ S. W. ¼ sect. 32, township 9, range 8 east; W. ½ N. E. ¼ and N. W. ¼ S. E. ¼ sec. 3, township 8, range 8 east. In the town of Wesson, and in section- 6, 3 and 4, township 8, range 8 east, and sections 33 and 34, township 9, range 8 east.

The following town lots are not owned by the Mississippi mills, of the above-described lands to wit: Lot of W. H. Hallam, of Mrs. Hartwell, John Sartain, Wm. Oliver, McPherson, two lots Wimberly and Rea, and lot Mr. R. E. Ray.

The town lots in this list mentioned as not the property of the Mississippi mills, *is* not intended to be included in this suit, as said complainant has no interest in them or *no*thing to do with them. The complainant further states that the real estate originally purchased by the corporators as part of the assets of the Mississippi Manufacturing Company, consisted of the site of the factory buildings proper, and lands valueless for other than purposes immediately connected with the main business. The machinery was, and is now, impelled by steam, and fuel supplying the place of water power, and lumber for structures, and other manufactories carried on by the company then, and *to* the complainant now, were indispensable, the factory is located on wild land, distant from towns and cities. In the condition of the country it was as necessary to provide for lodging the operatives as it was to provide shelter for the machinery and the real estate aforesaid attached to the factories was purchased and is used to supply these needs; that the act of incorporation recognized the property as pertaining to the business and authorized its conversion into capital stock, and it so exists as such stock at this time; so that it is not only property of the corporation, but property necessary to its operations, not purchased or used for profit, or as an investment, but for uses immediately connected with the main business and so employed. The complainant further states and charges that the Mississippi mills is yet largely indebted for purchases of machinery, for its manufacturing busi-
ness, that its entire increase has been absorbed in such pur-
34 chases, and in the erection of the needed buildings; that no dividend has been earned, and, therefore, no dividend declared; that the increase to the stockholders consists entirely in added machinery, and in the enlarged capacity of the mills; that the general stagnation of trade, common to the whole country has affected it, and it has not been, and is not able to declare a dividend, and that its profits over and above the expenses of operating the mills, and the payment of its debts incurred in the purchase

of machinery *has* not reached four per cent. and the full amount of the current year's taxes has been expended in the manner designated by the act of 1872.

And the complainant further avers that on the 14th day of December, 1877, it presented through its secretary and treasurer, Wm. Oliver, the affidavit required by the said act of 1872, to the collector, the said defendant, and demanded his receipt for the amount of the taxes assessed on the property of the corporation, but the said collector refused to give such receipt, or any receipt for the taxes of any portion of said property, unless upon the payment in cash of the tax collector's commissions and the commissions of the assessor in cash, or legal warrants for the assessment and collection of the taxes which would be due on the capital stock, the machinery, manufactured goods and the buildings in which said machinery is located, or within the necessary enclosure, around said buildings, the said defendant alleges that he will accept the affidavit aforesaid, in satisfaction of the tax due on the above-mentioned property the land which he alleges as exempt from taxation, being as follows: Five acres more or less, contained within the enclosure around the Mississippi mills, and the buildings therein situated, containing the machinery of the Mississippi mills, the same exempt under the act of 1877 of the legislature of Mississippi, the same being the enclosure in the town of Wesson, in which the Mississippi mills are located, and that the taxes due on all the other lands and property assessed to the Mississippi mills, must be paid as other taxes are paid, and that he would not receive said affidavit for the same.

And moreover the complainant charges that the said defendant insisted that the complainant should pay the taxes at the assessed value on all the property of the corporation before described and set forth in the list aforesaid, except the machinery and the buildings and ground on which they stand in which the machinery is placed or in operation and the paid-up capital stock, and manufactured goods; that the property excepted comprises almost the entire real estate of the corporation, taking in the ground on which the tenements of the operatives are located, and on which stand other buildings and storehouses in which no machinery is placed or operated, including the offices of the company, clerks and servants, and of its officers, this excepted property, complainant avers, was assessed with reference to its connection with the factories of the corporation and as a necessary adjunct to it, and the existence of the factory imparted to this property a value which it possesses for no purposes save those connected with the factories, being wildwood land principally valuable for lumber and wood. It was assessed very high at $75.00 per acre, so that the amount of taxes required to be paid for it is very large, to wit: about $4,728.68.

And the complainant further states and charges that the said defendant, the tax collector aforesaid, declared that the refusal of the complainant to pay the taxes so demanded, and the commissions aforesaid would be treated as a default by him and he has advertised and threatens to subject to sale, and will sell the real estate of

the complainant on which the taxes are demanded, to be paid, any property exempt or not owned by the company for the commissions and taxes aforesaid, unless restrained by the order of this honorable court. The complainant states, as he is advised, that any such sale would be void, but it would, nevertheless, create an apparent title and give rise to litigation, and embarrass the title to the property. The complainant further states that the said collector found his authority, or rather his pretended authority for his exaction of the taxes and commissions aforesaid, which latter are taxes under a very thin disguise, upon an act passed by the legislature of 1877, which act by the first and other sections thereof undertakes to repeal and limit the provisions of the said act of 1872. The complainant, however, charges expressly that the existing manufacturing establishment known as the Mississippi mills, was created and put in operation since the act of 1872 and since the act of 1873, making the provisions of the former act part of the charter of the Mississippi mills; that the machinery operated, and the structure containing and supporting *has* been purchased and brought into the State, and the structure built on the faith of said acts, and the expenditures very large and onerous made on the faith of said acts, and it insists that the said acts, as to it, are irrepealable, and subject to no modification without its consent, in so far as such modification may materially affect the benefits conferred by them; that the exemption from taxation as contained in the act of 1872, is part of the charter of the Mississippi mills, with all the effect as though it had been originally inserted in it, and on the faith of said act and charter, the present stockholders of the Mississippi mills made the entire expenditure by which the existing manufacturing establishment was created.

The complainant further states that said act of the legislature of 1877, as he is advised, and so advised, expressly charges
36 is in violation of the Constitution of the United States, because an act or law passed to impair the obligation of a contract, and is therefore void, so far as the complainant is concerned, and to execute it by a forced sale of the property of the complainant, a great wrong, wherefore, the complainant prays that the said W. W. Cook, the defendant be summoned to appear as a defendant to this suit, and required to answer this bill and in the meanwhile, in order to arrest this wrongful and illegal proceeding, the complainant prays that an injunction may issue enjoining and restraining the said defendants from collecting or attempting to collect the taxes and commissions so demanded as aforesaid, by sale of the complainant's real estate or otherwise, until the further order of the court, and on final hearing of the matters of this bill, the complainant prays that said injunction be made perpetual, and that the said collector, the defendant, or his successor in office, is directed and required to execute and deliver to the complainant a proper receipt for the taxes aforesaid in accordance with the terms of the act of 1872 and 1873 without regard to the provisions of the said act of 1877, and for such other and further relief as the case made shall justify, and as in duty bound, etc.

In verification of the facts set forth in the foregoing, the said Mississippi Mills affixes hereto its corporate seal with the signature of Wm. Oliver, its secretary and treasurer.

[SEAL.]

WM. OLIVER,
Sec'y & Treasurer.
HANNIS & GEORGE AND
HANNIS & MILLER,
Sol'rs for Compl't.

STATE OF MISSISSIPPI,
Adams County.

Pleas before the Honorable Claude Pintard, chancellor of the fourth chancery court district of the State of Mississippi, at a term of court begun, convened, and held at the court-house, in the city of Natchez, county of Adams and State of Mississippi, on Monday, the sixth day of March, in the year of our Lord one thousand eight hundred and ninety-three.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY ET AL.
vs.
JAMES W. LAMBERT, Sheriff and Tax Collector of Adams County, Miss.

Be it remembered that heretofore, to wit: on the 9th day of
37 January, A. D. 1893, the complainants, by their solicitors, Will T. Martin and Yerger and Percy, filed their certain bill of complaint with Exhibits "A," "D," "E" and "H," thereto in the office of the chancery clerk, the said bill and exhibits being in words and figures, as follows, to wit:

STATE OF MISSISSIPPI,
Adams County.

In Chancery, to March Term, 1893.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY and The Yazoo & Mississippi Valley Railroad Company, Corporations Duly Incorporated under the Laws of the State of Mississippi and Now Existing and Having Their Domicile in said State, Complainants,
vs.
JAMES W. LAMBERT, Sheriff and Tax Collector of Adams County, Mississippi, a Citizen of said County and State, Defendant.

To the honorable chancery court of Adams county, Mississippi:

Complainants show to the court that on the 21st day of August, 1870, by act of the legislature of said State, duly enacted and approved, as required by the laws of said State, the Natchez & Jackson Railroad Company was duly and legally incorporated, and by said act of incorporation, was granted authority and empowered to construct and finally complete a single or double railroad, or way, from the city of Natchez, in said county of Adams, to the city of Jackson, in the county of Hinds, in said State. That on the 23rd

day of February, 1872, by acts of the legislature of said State, approved and enacted as required by laws of said State, the charter of the Natchez & Jackson Railroad Company was so amended as to authorize said company at its pleasure to adopt the name and style of the Natchez, Jackson & Columbus Railroad Company, and to build such branches and feeders, as might be deemed practicable or necessary, and to construct its main line from Jackson to Columbus, Mississippi; and that by resolution of the board of directors of said Natchez & Jackson Railroad Company, duly passed, it was determined to accept the privilege granted to that company to change its name to that of the Natchez, Jackson & Columbus Railroad Company, and the change was made and acted on.

That on the 20th day of July, A. D. 1870, by act of the legislature of said State, duly enacted and approved, according to law,
38 the Mobile and Northwestern Railroad Company was incorporated and in the charter of the last-named company, there is, among other things, section 21, which is in the following words, to wit:

"SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources, by means of said railroad, as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional or burdensome taxation upon the people, the State hereby agrees with said company—which agreement is irrepealable, that all taxes to which said company shall be subject for the period of 30 years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands, or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same, and it shall be the duty of the tax collector, in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from the company an affidavit, made by the president or cashier of said company that the amount of said taxes have actually and in good faith been paid and applied by said company, during the year, in payment of the debts incurred, or money borrowed as aforesaid and which receipt shall be in full of all taxes, county, State and municipal, to which the said company shall be subject; provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

That on the 8th day of August, A. D. 1870, by an act of the legislature of said State, enacted and approved as by law required, sup-

plemental to the acts of incorporation of certain railroad companies, the provisions of said section 21 of the act incorporating the said Mobile and Northwestern Railroad Company, were made to apply to the Natchez, Jackson & Columbus Railroad Company, the charter of which was so amended by said act of March 5th, 1878, as to confer upon said Natchez, Jackson & Columbus Railroad Company, all the rights, privileges, immunities and franchises theretofore granted or intended to be granted by, and embraced in the 21st section of said act, entitled: "An act to incorporate the
39 Mobile and Northwestern Railroad Company," and by said act, all taxes, State, county and municipal theretofore levied and assessed, or thereafter to be levied and assessed, upon the property of the Natchez, Jackson & Columbus Railroad Company, were by the State of Mississippi, and by the provisions of said act, appropriated and set apart, and were to be applied in the manner and for the purposes mentioned in the said 21st section of the act, incorporating the Mobile & Northwestern Railway Company, and that said appropriation and application was to continue for 30 years, from the 8th day of August, A. D. 1870.

That on the 19th day of February, A. D. 1890, the legislature of the State of Mississippi, by an act of that date enacted and approved according to the laws of said State, authorized the Natchez, Jackson & Columbus Railroad Company to sell all or any part of its railroad and other property situated in the State of Mississippi, together with all franchises, rights, privileges and immunities unto said company belonging.

Complainants further show, that on the 18th day of August, 1881, the Tennessee Southern Railroad Company was duly and regularly incorporated under and by virtue of the laws of the State of Tennessee. That on the 8th day of August, 1870, the Vicksburg & Memphis Railroad Company; and on the 9th day of March, 1882, the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company *was* duly and regularly incorporated, under and by virtue of the laws of the State of Mississippi, and that on the 17th day of September, 1881, the New Orleans & Mississippi Valley Railroad Company was duly and regularly incorporated, under and by virtue of the laws of the State of Louisiana.

Complainant- further show, that by an act of the legislature of the State of Mississippi approved March 3d, 1882, entitled "An act to authorize the Memphis & Vicksburg Railroad Company, and the Mississippi Valley & Ship Island Railroad Company, to effect a consolidation," the Memphis & Vicksburg and the Mississippi Valley and Ship Island Railroad Companies were authorized and empowered to consolidate with each other, or any other railroad company, or companies, that had been incorporated under the laws of the State of Mississippi, or any other State, and so that all companies so consolidated, should be merged into and become one company; and by said act it was provided, that the company so formed by said consolidation, should be deemed and held to be a corporation created by the laws of the State of Mississippi, and should have, enjoy and possess all the rights, ways and privileges, franchises,

property, grants and immunities which at the time of the passage of the act were possessed by the companies that might enter into such consolidation, as fully as though the same were conferred specifically in said act, and to that end, the charters of the said consolidated companies should be taken and held as part of said act authorizing the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation.

That subsequent to the passage of said last-named act, an amendment thereto was passed by the legislature of the State of Mississippi, which amendment is entitled: "An act to amend an act entitled An act to authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation," approved March 3d, 1882. That said amendatory act was approved March 10th, 1882, and authorized and empowered the Memphis & Vicksburg Railroad Company and any other railroad company, or companies incorporated under the laws of this State, to consolidate in the manner, and upon the terms and conditions, and with rights and privileges and immunities in the said act mentioned with each other, or any other railroad company or companies incorporated, or organized under the laws of any other State or States, and that such consolidation might be so effected, whether the Mississippi Valley & Ship Island railroad became a party to such consolidation or not.

That under and by virtue of the statutes of the respective States of Mississippi, Tennessee, and Louisiana in such cases made and provided, and in consideration of the mutual undertaking-, covenants and agreements then entered into by said companies, the Tennessee Southern Railroad Company, created as aforesaid and then existing under — by virtue of the laws of the State of Tennessee, and the Memphis & Vicksburg Railroad Company, a corporation created as aforesaid, and then existing under and by virtue of the laws of the State of Mississippi; the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, a corporation created as aforesaid, and then existing under and by virtue of the laws of the State of Mississippi; and the New Orleans and Mississippi Valley Railroad Company, a corporation created as aforesaid and then existing under and by virtue of the laws of the State of Louisiana, entered into and effected the consolidation of each of said companies into one railroad company, to be thereafter known as the Louisville, New Orleans and Texas Railway Company, and that into said consolidated company, has merged and consolidated the several capital stocks, franchises, grants, immunities, privileges, properties, rights of way and all property, real, personal, and mixed of the several companies as hereinbefore mentioned, as entering into said consolidation as shown by a certificate of consolidation filed herewith, and marked "Exhibit A" and prayed to be taken and considered as part of this bill.

That in pursuance of said act of February 10th, 1890, hereinbefore referred to, the said Natchez, Jackson & Columbus Railroad Company did, on the 5th day of March, 1890, by deed duly executed

and delivered, sell to the Louisville, New Orleans and Texas Railway Company, all the railroad property situated in the State of Mississippi, and particularly the line of railroad constructed by the said Natchez, Jackson & Columbus Railroad Company, and running from the city of Natchez, in the county of Adams, to the city of Jackson in the county of Hinds, in the State of Mississippi, together with all rights, powers, privileges and immunities, possessed by said Natchez, Jackson & Columbus Railroad Company, as to said property so sold as aforesaid, and in which rights, powers, privileges and immunities, complainants charge was embraced the right to have the president or cashier of the Louisville, New Orleans & Texas Railway Company, or its successors or assigns make the aforesaid affidavit as required by sec. 21 of the act creating and incorporating the Mobile & Northwestern Railroad Company, showing the payment of the taxes then due, or thereafter to become due on the property, so sold as aforesaid, by the Natchez, Jackson & Columbus Railroad Company, and the payment of the debts incurred by the said Natchez, Jackson & Columbus Railroad Company, and used by it in the construction of the railroad built by it from Natchez to Jackson, Mississippi, and also the right to have said taxes applied to the payment of said debts, so incurred in the construction of the railroad as aforesaid.

Complainants aver that said sale and conveyance to said Louisville, New Orleans and Texas Railway Company by said Natchez, Jackson & Columbus Railroad Company was made to said Louisville, New Orleans and Texas Railway Company subject to an indebtedness of the selling company, as evidenced by its bonds of one million two hundred and fifty thousand dollars, and that said indebtedness was incurred by the said Natchez, Jackson & Columbus Railroad Company in the construction of its said railroad from Natchez to Jackson, and the said sum of one million, two hundred and fifty thousand dollars was used in the construction of its said road, by said Natchez, Jackson & Columbus Railroad Company; the road so constructed being that sold as aforesaid, to the said Louisville, New Orleans and Texas Railway Company, and that by section 25 of an act of the legislature of the State of Mississippi, entitled "An act to incorporate the New Orleans, Baton Rouge,
42 Vicksburg & Memphis Railroad Company, approved March 9th, 1882," the Louisville, New Orleans and Texas Railway Company was authorized to purchase the property, rights, powers and immunities of the Natchez, Jackson & Columbus Railroad Company from it, as hereinbefore set forth.

Complainants further show, and aver, that under charter granted to it, the Natchez, Jackson & Columbus Railroad Company constructed in Adams county, Mississippi, 14 and one hundred and twenty-eight one-thousandths miles of railroad and that these fourteen and one hundred and twenty-eight one-thousandths miles of railroad, *was* a part of that property included in the sale and conveyance by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company as hereinbefore set forth.

Complainants state and expressly charge that in the transfer and sale as aforesaid, by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, the franchises possessed by the Natchez, Jackson and Columbus Railroad Company of being a corporation *were* not sold and did not pass to the Louisville, New Orleans and Texas Railway Company by the sale aforesaid, and that the corporate existence of said Natchez, Jackson & Columbus Railroad Company, since said sale to the Louisville, New Orleans and Texas Railway Company still exists and is intact and in full force, and that the stockholders of the Natchez, Jackson & Columbus Railroad Company, since said sale to the Louisville, New Orleans and Texas Railway Company, have held meetings and elected officers as provided in the charter of that company, and that said company has now a full complement of officers, as required by the charter thereof. That the action of the legislature in extending the provisions of the 21st section of the act incorporating the Mobile & Northwestern Railroad Company to the several railroad companies named in the act of 1870, and hereinbefore set forth, was an inducement held out by the State of Mississippi, to the incorporators named in the charters of said companies and their associates to invest money in the State of Mississippi, and under said charters to construct railroads therein; that the inducement so held out by said State to the Natchez, Jackson & Columbus Railroad Company was accepted by said company, and acted on in good faith, and under its charter and the several amendments thereof, that company constructed a railroad in the State of Mississippi, from Natchez to Jackson, 93¾ miles in length, and that thereby the charter originally incorporating the Natchez,
43 Jackson & Columbus Railroad Company and the several amendments thereto, and the provisions, privileges, and immunities contained in said 21st section of the act incorporating the Mobile & Northwestern Railroad Company and made part of the charter of the Natchez, Jackson & Columbus Railroad Company as aforesaid, became a contract between the State of Mississippi and the Natchez, Jackson & Columbus Railroad Company, which is irrepealable and inviolable.

Complainants further state that on the faith of said contract and the provisions of the charter incorporating the Natchez, Jackson & Columbus Railroad Company, and the several amendments thereto, and the privileges granted by, and the provisions contained in said 21st section of the act incorporating the Mobile and Northwestern Railroad Company, the Natchez, Jackson & Columbus Railroad Company invested its capital in the construction of the line of said road, from the city of Natchez to the city of Jackson, as aforesaid, and has, since the construction of said railroad, employed its capital in the operation and maintenance thereof, relying on said contract, and reposing in the belief that the taxes to which it was subject would be appropriated, by the State of Mississippi, to the payment of its debts and liabilities, incurred in the construction of said railroad, and as provided for by said section 21st of the act incorporating said Mobile & Northwestern Railroad Company, and that said

contract and agreement on the part of the State of Mississippi, went far beyond the mere privilege of an exemption from taxation, the State having solemnly agreed in said contract, and by the acts of the legislature aforesaid, that if said company should construct a railroad as provided for in its charter and the amendments thereto and should incur debts and liabilities in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight per cent. upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of its incorporation, in 1870, should be appropriated by the State of Mississippi, to the payment of the debts and liabilities incurred by the company in building said road.

Complainants further show, and state, that, by the sale and conveyance of the said road from Natchez to Jackson, Miss., by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, together with the privileges and immunities thereunto belonging, the Louisville, New Orleans and Texas Railway Company became entitled to have the taxes on the property, so sold to it as aforesaid by the Natchez, Jackson & Columbus Railroad Company, applied to the payment of the debts incurred by the Natchez, Jackson & Columbus
44 Railroad Company in the construction of said railroad so sold, as aforesaid.

Complainants further show, that on the 17th day of February, 1882, by an act of the legislature, duly enacted and approved as required by the laws of the State of Mississippi, the Yazoo & Mississippi Valley Railroad Company was incorporated, and that it is now an existing corporation under the laws of the said State, having its domicile therein; that on the 25th day of October, 1892, the Louisville, New Orleans and Texas Railway Company was merged into and consolidated with the Yazoo & Mississippi Valley Railroad Company, and that by said merger and consolidation, the capital stock, franchises, grants, privileges, immunities, properties, rights of way and all property, real, personal and mixed, theretofore belonging to the Louisville, New Orleans and Texas Railway Company, *was* merged into, and became the property of the Yazoo & Mississippi Valley Railroad Company, all of which will fully appear by reference to a certified copy of said act of consolidation, to be filed with bill and marked "Exhibit C," and prayed to be taken as a part of this bill. That the said merger and consolidation between the said railroad companies, last named, was authorized by the charters of each of said companies, and was duly, regularly and legally made and entered into by said companies.

Complainants charge that by reason of said merger and consolidation last above named, the Yazoo & Mississippi Valley Railroad Company thereby became entitled to, and was immediately upon said merger and consolidation, possessed of all the rights, powers, privileges, and immunities theretofore belonging to said Natchez, Jackson & Columbus Railroad Company, and the said Louisville, New Orleans and Texas Railway Company, and in which said

rights, powers, privileges and immunities, complainants charge, was embraced the right to have the president or cashier of the Yazoo & Mississippi Valley Railroad Company, or its successors or assigns, make the affidavit required by section 21 of the act incorporating the Mobile & Northwestern Railroad Company showing the payment and application of the taxes then due, or to become thereafter due on the property sold, as aforesaid, by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, to the payment of the debts of the Natchez, Jackson and Columbus Railroad Company, incurred by it and used by it in the construction of the railroad from Natchez to Jackson, Mississippi, and to have said taxes applied to the payment of the debts and liabilities incurred by said Natchez,
45 Jackson & Columbus Railroad Company in the construction of said railroad from Natchez to Jackson, Mississippi.

Complainants further show and charge that in the years 1891 and 1892, the Natchez, Jackson & Columbus Railroad Company, and the Louisville, New Orleans and Texas Railway Company, actually and in good faith, paid and applied the amount of taxes to which said Natchez, Jackson & Columbus Railroad Company was subject, and to which the said Louisville, New Orleans and Texas Railway Company was subject, on the property purchased by it from the Natchez, Jackson & Columbus Railroad Company for each of said years, 1891 and 1892, in the payment of the debts and liabilities incurred by said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad from Natchez to Jackson, Mississippi, and in the said county of Adams, to be used, and which was used in the construction of said road, or in paying debts incurred in constructing the same, and that the profits of neither the Natchez, Jackson & Columbus Railroad Company, nor of the Louisville, New Orleans and Texas Railway Company, nor of the Yazoo & Mississippi Valley Railroad Company have been sufficient to enable the said companies, or either of them, to declare and pay to the stockholders thereof, an annual dividend of eight per cent., or any per cent., on the capital stock of said companies, or either of them, over and above the payment of the debts and liabilities of said companies, and each of them; and that complainants have caused to be made by the proper officer of each of the said companies, affidavits setting forth said facts, and in strict compliance with the requirements of section 21 of the act incorporating the Mobile & Northwestern Railroad Company hereinbefore fully set forth, and have presented said affidavits to the defendant in this suit, who is the sheriff and tax collector of Adams county, Mississippi, and have demanded of him as such collector, sheriff and tax collector, a receipt in full for all taxes, State, county, and municipal to which said companies, or either of them, were subject for the years 1891 and 1892, on property situated in said county of Adams, Mississippi; and that notwithstanding the payment and application of the amount of taxes to the debts and liabilities of the Natchez, Jackson, and Columbus Railroad Company, as hereinbefore set forth, and the making and presentation of the affidavits, as herein-

before set forth, and the demand for the receipt in full for all taxes to which the companies heretofore mentioned were, or are subject in said county of Adams, for the years 1891 and 1892, the said defendant not regarding the rights of complainants, refused, and still refuses to comply with said demand.

46 The following is the amended bill of the complainants and is embraced within the following parenthesis, drawn with red ink. The portion of this transcript within the red-ink-line parenthesis contains the amendment to bill filed by complainants, February 24th, 1893.

Attest: ALLISON H. FOSTER, *Clerk.*

Chancery Court, Adams County, Mississippi.

THE NATCHEZ, JACKSON & COLUMBUS RAILROAD COMPANY and The Yazoo and Mississippi Valley Railroad Company
vs.
JAMES W. LAMBERT, Sheriff and Tax Collector. } No. 1216.

Amendment to Bill.

To be inserted at the end of line 29, page 19, of the bill herein.

"Complainants would further show, that after the purchase of the property of the Natchez, Jackson & Columbus Railroad Company by the Louisville, New Orleans and Texas Railway Company as hereinbefore stated and as shown by the deed from the said Natchez, Jackson and Columbus Railroad Company to said Louisville, New Orleans and Texas Railway Company, dated —— 28th, 1890, that the line of railroad purchased from said Natchez, Jackson & Columbus Railroad Company by said Louisville, New Orleans and Texas Railway Company, running from the city of Natchez, in the county of Adams, to the city of Jackson, in the county of Hinds, of the State of Mississippi, was operated and maintained as a separate division, and that the amounts of the receipts, expenditures and disbursements of said division of railroad running from said city of Natchez to said city of Jackson as aforesaid, were so kept by the officers of the said Louisville, New Orleans and Texas Railway Company as to enable them at all times to ascertain and furnish a full, complete and accurate statement of the receipts received from the operation and maintenance of said division of railroad; and the disbursements and expenditures made by said company in the maintenance and operation of said division of railroad, and of the gross and net earnings of said line of railroad constituting said division and running from the city of Natchez to said city of Jackson; and that at the time of purchasing said line of railroad running from the city of Natchez to the city of Jackson as aforesaid, from the said Natchez, Jackson and Columbus Railroad Company, and at the time

47 of the making and ordering and filing the copies of the affidavits herewith filed as exhibits to this bill of complaint and showing the application of taxes to which company was subject to the payment of the debts and liabilities incurred by said Natchez,

Jackson & Columbus Railroad Company in the construction of said road running from the city of Natchez to said city of Jackson as aforesaid, there was a contract existing between the State of Mississippi and the said Natchez, Jackson and Columbus Railroad Company, and said Louisville, New Orleans and Texas Railway Company, authorizing each of said companies and empowering them under said contract to apply to the payment of the debts and liabilities which said companies had incurred in the construction of railroads in the State of Mississippi, all taxes to which said companies, or either of them were subject; and that the taxes sought to be collected by defendant on the line of railroad from Natchez to Jackson, sold as aforesaid by the Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company, had, prior to the attempt of defendant to collect said taxes, been applied by complainants as they were authorized by law to do, to the debts incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the line of railroad from the city of Natchez to the city of Jackson, sold as aforesaid by the Natchez, Jackson & Columbus Railroad Company, to the said Louisville, New Orleans and Texas Railway Company."

"Agreed, that this amendment shall now be filed to take effect as if it had been embraced in the original bill herein.

Natchez, February 24, 1893.

K. PALMER LANNEAU,
Sol. for Deft.

Complainants charge, that defendant, as sheriff and tax collector of said Adams county, is and was by law required to accept said affidavits and give a receipt in full for the taxes hereinbefore mentioned, as well as any privilege tax that had been, or might be demanded, by said State of Mississippi, or to which complainants, or the Louisville, New Orleans & Texas Railway Company was, or might be, subjected, on the part of said railroad operated in said Adams county, Mississippi; that the payment and application of said taxes, the making of said affidavits, the presentation thereof to defendant and his refusal to deliver said tax receipts as required by section 21 of the act incorporating the Mobile & Northwestern Railroad Company, will fully appear by an examination of a true copy of said affidavits made and presented as aforesaid, together with the indorsement of the defendant thereon, the originals
48 whereof are now on file in your honor's court as Exhibits "D," "E," "F" and "G," to bill of complaint in the suit filed by your complainant *vs.* defendant to enjoin the collection of State and county taxes for the years 1891 and 1892 on the property of complainants in said Adams county, Mississippi, and also the certificate of said sheriff and tax collector, that the Mississippi railroad commission of the State of Mississippi, during the month of November, 1892, certified to him, said defendant, that privilege taxes were due for the year 1892, due by the said Louisville, New Orleans & Texas Railway Company, Natchez, Jackson & Columbus division, assessed by said commission as "class 3rd," at the valuation of

$10,000 per mile, and on 13.300 miles, the total privilege tax claimed being $133.00, and that in default of payment of said privilege tax, he did, on the 30th day of December, levy on passenger coach No. 11, then on the railroad at complainants' The Yazoo & Mississippi Valley's depot in the city of Natchez, Mississippi, as will more fully appear by reference to copies of said affidavits, indorsements thereon and said certificate of sheriff to be filed herewith as Exhibits "D," "E," "F" and "H," and prayed to be taken as a part of this bill.

That prior to the levy on said car, which said defendant has seized and advertised for sale, to wit: on the — day of December, 1892, the said affidavits were again presented to said defendant as sheriff and tax collector, and a receipt for said privilege taxes so assessed, as shown above, was demanded by complainants, and was refused by defendant, and he has advertised said car for public sale, to enable him to collect said privilege tax, and will proceed to sell it unless restrained by order of this court, to the great damage of and violation of the rights of complainants as hereinbefore set forth.

Complainants further show, that having refused to receive or recognize the affidavits of complainants, showing the payment and application of the taxes of 1891 and 1892 to the debts and liabilities of the Natchez, Jackson & Columbus Railroad Company, incurred and used in the construction of the railroad running from Natchez to Jackson, Mississippi, and to give a receipt in full for said taxes, including said privilege tax, and claiming that the affidavits tendered him are not sufficient in law to warrant him in giving receipts for said taxes including said privilege tax, the said defendant, sheriff and tax collector of Adams county, will, unless restrained by order of this court, proceed, as he has advertised he will do, to sell on the — day of January, 1893, the said car seized by him as aforesaid, to satisfy said demand for privilege tax of $133.00, damages and costs, regardless of the rights of complainants, as hereinbefore set forth.

49 The premises considered, complainants pray that James W. Lambert, sheriff and tax collector of Adams county, Mississippi, be made a party defendant to this bill, and be required to answer all the allegations thereof, and that he be inhibited and enjoined, by order of this court from proceeding to collect said privilege tax of $133.00, assessed by said railroad commission for the year 1892, claimed by him to be due as aforesaid on the property of complainants, derived as aforesaid from the Louisville, New Orleans and Texas Railway Company, or the Natchez, Jackson & Columbus Railroad Company, and from selling the said car levied on as aforesaid, or any other property of roads aforesaid, and that on final hearing he be perpetually enjoined from collecting said privilege tax, or interferring on account thereof with the property of complainants in the said county of Adams, and that he be required by the order of this court to deliver to complainants a receipt as by law required, for the amount of said privilege tax assessed and levied as aforesaid.

May it please your honor to grant the said complainants, the State's writ of subpœna, directed and commanding, etc.

And as in duty bound, complainants will ever pray, etc.

YERGER & PERCY AND
WILL T. MARTIN,
Complainants' Solicitors.

STATE OF MISSISSIPPI, }
Adams County. }

Personally appeared before me, Allison H. Foster, clerk of the chancery court of said county, Will T. Martin, one of the solicitors for complainants in the foregoing bill of complaint, who states on oath, that the matters and things set forth in the foregoing bill as stated therein on the knowledge of complainants or affiant are true, and those stated on the information of others, he verily believes to be true.

WILL. T. MARTIN.

Sworn to and subscribed before me this 7th day of January, A. D. 1893.

[SEAL.] ALLISON H. FOSTER, *Clerk.*

EXHIBITS "D" AND "E."

STATE OF MISSISSIPPI, }
County of Adams. }

Personally appeared before me, the undersigned Allison H.
50 Foster, clerk of the chancery court of the county aforesaid, A. M. Cooke, president of the Natchez, Jackson & Columbus Railroad Company, with whom I am personally acquainted, and whom I know to be the president of said company, who, being first duly sworn, made oath and deposed as follows:

1. That he is the president of the Natchez, Jackson and Columbus Railroad Company, a corporation existing under the laws of the State of Mississippi.

2. That in the year 1891 the said railroad company applied as much as the sum of $75,000 *dollars* to the payment of the debts and liabilities which said company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad and paying debts incurred by said company in constructing same.

3. That the amount of all the taxes upon said railroad for the year 1891, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1891, in the payment of the debts incurred or of the money borrowed as aforesaid; and that the amount of taxes upon said railroad in the county of Adams, State of Mississippi, in and for the year 1891, have actually and in good faith been paid and applied to the pay-

ment of the debts incurred, or money borrowed in the construction of said railroad in said county of Adams during the year 1891.

4. That the income and profits derived from said railroad and the use and operation thereof for the year 1891, or for any year since its construction, have not been sufficient to pay any dividend to its stockholders or owners; and that for the year 1891, the profits of said company, or the profits derived from the use and operation of said railroad, have not either or both been sufficient to enable it to declare and pay to the stockholders an annual dividend of eight per cent. on its capital stock, over and above the payment of its debts and liabilities.

A. M. COOKE.

Sworn to and subscribed before me this 5th day of November, A. D. 1892.

[SEAL.] ALLISON H. FOSTER, *Clerk*,
By WM. A. FOSTER, *D. C.*

STATE OF MISSISSIPPI, }
Adams County. }

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel, I respectfully decline to give a receipt
51 for the taxes assessed against the L., N. O. & T. R. R., Natchez division, in the county of Adams and State of Mississippi, for the year 1891, said taxes not having been paid, and the within affidavit not being regarded by me as sufficient to warrant me in receiving the same in lieu of the said taxes, or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF TENNESSEE, }
County of Shelby, } *ss:*

Personally appeared before me, the undersigned H. B. Belt, a commissioner for the State of Mississippi, duly appointed and qualified according to the laws thereof, and resident in Memphis, Tennessee, James M. Edwards with whom I am personally acquainted who, being first duly sworn, made oath and deposed as follows:

1. That he was, prior to the 25th day of October, 1892, vice-president and cashier of the Louisville, New Orleans and Texas Railway Company, a corporation existing under the laws of the State of Mississippi, prior to said date.

2. That on the 28th day of March, 1890, the Natchez, Jackson & Columbus Railroad Company, by deed duly executed and delivered, granted, bargained, sold, assigned, transferred and conveyed to the Louisville, New Orleans and Texas Railway Company as it was by law authorized to do, the railroad theretofore constructed and owned by the Natchez, Jackson & Columbus Railroad Company, from Natchez to Jackson, Mississippi, and also the immunity from taxation then held, enjoyed and possessed by said Natchez, Jackson & Columbus Railroad Company, together with the right to apply the amount

of all such taxes as said Natchez, Jackson & Columbus Railroad Company might be subject —, to the payment of the debts and liabilities which were incurred by said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad, and in paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same; and also, all other property owned at said date by the Natchez, Jackson & Columbus Railroad Company in the county of Adams and State of Mississippi.

3. That the sale, conveyance and transfer of the railroad running from Natchez to Jackson, Mississippi, and, also, the immunity from taxation then held and possessed by the Natchez, Jackson &
52 Columbus Railroad Company, together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company was subject to, to the payment of the debts and liabilities *of* which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad running from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company to be used, and which was used, by said company, in constructing said railroad and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same, was made by said Natchez, Jackson & Columbus Railroad Company, to the Louisville, New Orleans & Texas Railway Company, subject to an indebtedness of $1,250,000, which sum was incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the railroad from Natchez to Jackson, Mississippi, by said company, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad, and paying debts incurred by said company in constructing the same, and which said indebtedness is evidenced by the bonds of the said Natchez, Jackson & Columbus Railroad Company for the said sum of $1,250,000, and which said indebtedness, and said bonds, are still outstanding and unpaid.

4. That in the year 1891, the Louisville, New Orleans and Texas Railway Company applied as much as $75,000 to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in the payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same.

5. That the amount of all the taxes upon said railroad constructed by the Natchez, Jackson & Columbus Railroad Company from Natchez to Jackson, Mississippi, and, upon the other property sold and conveyed by said company, situated in the county of Adams, State of Mississippi, to the Louisville, New Orleans and Texas Rail-

way Company, for the year 1891, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1891, in the payment of the debts and liabilities incurred in the construction of the railroad from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company; or, in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and
53 which was used, in constructing said railroad, and paying debts incurred by said company in constructing the same; and that the amount of the taxes upon said railroad and other property, situated in the county aforesaid, conveyed by said Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Co. as aforesaid, in the county of ——, State of Mississippi, in and for the year 1891, have actually and in good faith been applied to the payment of the debts incurred, or money borrowed and used in the construction of said railroad in said county of Adams, during the year 1891.

6. That the income and profits derived from the said railroad constructed from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company, and by it sold and conveyed to the Louisville, New Orleans & Texas Railway Company, as aforesaid, and the use and operation thereof, for the year 1891, or for any year since its construction, have not been sufficient to pay any dividend to either the stockholders of the Natchez, Jackson & Columbus Railroad Company, the Louisville, New Orleans and Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company, or the owners of such railroad; and, that for the year 1891, neither the profits of the L., N. O. & T. R. R. Co., nor of the Yazoo and Mississippi Valley Railroad Company, or the profits derived from the use and operation of said railroad from Natchez to Jackson, Mississippi, have either or both been sufficient to enable either of said companies to declare and pay to the stockholders thereof an annual dividend of eight per cent., or any per cent. on the capital stock of said companies, or either of them, over and above the payment of their debts and liabilities.

7. That on the 24th day of October, 1892, the Louisville, New Orleans & Texas Railway Co. was merged into, and was consolidated with the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi, and by which the Yazoo & Mississippi Valley Railroad Company became entitled to all the property, rights, privileges, powers and immunities theretofore belonging to the said Louisville, New Orleans & Texas Railway Company.

8. That he is now the third vice-president and cashier of the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi.

JAS. M. EDWARDS,
3rd V. P. and Cashier, Y. & M. V. R. R. Co.

Sworn to and subscribed before me, this 4 day of Nov. 1892, and in testimony whereof, witness my signature and official seal.

[SEAL.] H. B. BELT,
Com. for Miss.

54 THE STATE OF MISSISSIPPI, }
Adams County. }

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel, I respectfully decline to give a receipt for the taxes assessed against the L., N. O. & T. R. R. Co., Natchez division, in the county of Adams, State of Mississippi, for the year 1891, said taxes not having been paid and the within affidavit not being regarded by me as sufficient to warrant me in receiving the same in lieu of the said taxes, or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF MISSISSIPPI, }
County of Adams. }

Personally appeared before me the undersigned Allison H. Foster, clerk of the chancery court of the county aforesaid, A. M. Cooke, president of the Natchez, Jackson & Columbus Railroad Company, with whom I am personally acquainted, and whom I know to be the president of said company, who, being first duly sworn, made oath and deposed, as follows:

1. That he is the president of the Natchez, Jackson & Columbus Railroad Company, a corporation existing under the laws of the State of Mississippi. That in the year 1892, the said railroad company applied as much as the sum of $75,000 to the payment of the debts and liabilities which said company had incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company to be used, and which was used in constructing said railroad and paying debts incurred by said company in constructing said railroad company in constructing the same.

3. That the amount of all the taxes upon said railroad for the year 1892, in the county of Adams, State of Mississippi, have actual y and in good faith been paid and applied during the year 1892, in the payment of money borrowed, or debts incurred as aforesaid; and that the amount of the taxes upon said railroad in the county of Adams, State of Mississippi, in and for the year —, have actually and in good faith been paid and applied to the payment of the debts incurred or money borrowed in the construction of said railroad in said county of Adams, during the year 1892.

4. That the income and profits derived from the said railroad and the use and operation thereof for the year 1892, or for any year since its construction, have not been sufficient to pay any dividend
55 to its stockholders or owners; and that for the year 1892, the profits of said company, or the profits derived from the use

and operation of said railroad have not either, or both, been sufficient to enable it to declare and pay to the stockholders an annual dividend of eight per cent., or any per cent., on its capital stock, over and above the payment of its debts and liabilities.

A. M. COOKE,
Pres't N., J. & C. R. R. Co.

Sworn to and subscribed before me this 5th day of November, A. D. 1892.

[SEAL.] ALLISON H. FOSTER, *Clerk*,
By WM. A. FOSTER, *D. C.*

TAX COLLECTOR'S OFFICE, NATCHEZ, MISS., *Nov.* 5, 1892.

On advice of counsel I respectfully decline to give a receipt for the taxes assessed against the L., N. O. & T. R. R. Co., Natchez, Jackson & Columbus division, in the county of Adams, State of Mississippi, for the year 1892, said taxes not having been paid, and the within affidavit not being regarded by me as sufficient to warrant me in receiving the same in lieu of said taxes or to justify me in giving such receipt.

JAS. W. LAMBERT,
Tax Collector, Adams County.

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before me, the undersigned H. B. Belt, a commissioner for the State of Mississippi, duly appointed and qualified according to the laws thereof, and resident in Memphis, Tennessee, James M. Edwards, with whom I am personally acquainted, who, being by me first duly sworn, made oath and deposed, as follows:

1. That he was, prior to the 24th day of October, 1892, vice-president and cashier of the Louisville, New Orleans and Texas Railway Company, a corporation existing under the laws of the State of Mississippi prior to said date.

2. That on the 28th day of March, 1890, the Natchez, Jackson & Columbus Railroad Company, by deed duly executed and delivered, granted, bargained and sold, assigned, transferred and conveyed to the Louisville, New Orleans and Texas Railway Company, as it was by law authorized to do, the railroad theretofore constructed and owned by said Natchez, Jackson & Columbus Railroad Company,
56 from Natchez to Jackson, Mississippi, and also the immunity from taxation then held, enjoyed and possessed by said Natchez, Jackson & Columbus Railroad Company, together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company might be subject —, to the payment of the debts and liabilities which were incurred by the said Natchez, Jackson & Columbus Railroad Company in the construction of said railroad; or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad,

and in paying debts incurred by the said Natchez, Jackson & Columbus Railroad Company in constructing the same; and also all other property owned at said date by the Natchez, Jackson & Columbus Railroad Company, in the county of Adams and State of Mississippi.

3. That the sale, conveyance and transfer of the railroad running from Natchez to Jackson, Mississippi, and, also of the immunity from taxation then held and possessed by the Natchez, Jackson & Columbus Railroad Company together with the right to apply the amount of all such taxes as said Natchez, Jackson & Columbus Railroad Company was subject to, to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of the railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same, was made by the said Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans & Texas Railway Company subject to an indebtedness of $1,250,000; which said sum was incurred by the Natchez, Jackson & Columbus Railroad Company in the construction of the railroad from Natchez to Jackson, Mississippi, by said company or in payment for money borrowed by said Natchez, Jackson & Columbus Railroad Company, to be used, and which was used, in constructing said railroad, paying debts incurred by said company in constructing the same, and which said indebtedness is evidenced by the bonds of said Natchez, Jackson & Columbus Railroad Company for said sum of $1,250,000, and which said indebtedness and bonds are still outstanding and unpaid.

4. That in the year of 1892 the Louisville, New Orleans and Texas Railway Company applied as much as the sum of $75,000 to the payment of the debts and liabilities which the Natchez, Jackson & Columbus Railroad Company incurred in the construction of its railroad from Natchez to Jackson, Mississippi, or in payment for money borrowed by said Natchez, Jackson & Columbus Rail-
57 road Company to be used and which was used by said company in constructing said railroad, and paying debts incurred by said Natchez, Jackson & Columbus Railroad Company in constructing the same.

5. That the amount of all the taxes upon said railroad constructed by the Natchez, Jackson & Columbus Railroad Company from Natchez to Jackson, Miss., and, upon the other property sold and conveyed by said company, situated in the county of Adams, State of Mississippi, to the Louisville, New Orleans and Texas Railway Company for the year 1892, in the county of Adams, State of Mississippi, have actually and in good faith been paid and applied during the year 1892 in the payment of the debts and liabilities incurred in the construction of the railroad from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company; or, in payment for money borrowed by said Natchez, Jackson &

Columbus Railroad Company, to be used, and which was used in constructing said railroad and paying debts incurred by said company in constructing same; and that the amount of the taxes upon said railroad and other property, situated in the county aforesaid, conveyed by the said Natchez, Jackson & Columbus Railroad Company to the Louisville, New Orleans and Texas Railway Company as aforesaid, in the county of ——, State of Mississippi, in and for the year 1892, have actually and in good faith been applied to the payment of the debts incurred, or money borrowed and used in the construction of said railroad in said county of Adams, during the year 1892.

6. That the income and profits derived from said railroad constructed from Natchez to Jackson, Mississippi, by the Natchez, Jackson & Columbus Railroad Company, and by it sold and conveyed to the Louisville, New Orleans and Texas Railway Company, as aforesaid, and the use and operation thereof, for the year 1892, or for any year since its construction, have not been sufficient to pay any dividend to either the stockholders of the Natchez, Jackson & Columbus Railroad Company, the Louisville, New Orleans and Texas Railway Company, or the Yazoo & Mississippi Valley Railroad Company, or the owners of said railroad; and that for the year 1892, neither the profits of the L., N. O. & T. R. R. Co., nor of the Yazoo & Mississippi Valley Railroad Company or the profits derived from the use and operation of said railroad from Natchez to Jackson, Mississippi, have either both been sufficient to enable either of said companies to declare and pay to the stockholders thereof an annual dividend of 8 per cent. or any per cent., on the capital stock of said companies, or either of them, over and above the payment of their debts and liabilities.

7th. That on the 24th day of October, 1892, the Louisville,
58 New Orleans and Texas Railway Company was merged into and was consolidated with the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi, and by which the Yazoo and Mississippi Valley Railroad Company became entitled to all the property, rights, privileges, powers and immunities theretofore and then belonging to the said Louisville, New Orleans & Texas Railway Company.

8th. That he is now the third vice-president and cashier of the Yazoo & Mississippi Valley Railroad Company, a corporation existing under the laws of the State of Mississippi.

JAS. M. EDWARDS,
3rd Vice-President and Cashier Y. & M. V. R. R. Co.

Sworn to and subscribed before me, this 4th day of November, 1892, and in testimony whereof witness my signature and official seal.

[SEAL.] H. B. BELT,
Com. for Miss.

And afterwards on March 6th, 1893, the plea and demurrer of defendant was filed, same being in the words and figures following, to wit:

The said defendant by protestation not confessing, &c., &c., for the plea unto a part of said bill of complaint, viz: unto so much and such parts of said bill, as contain allegations and references to the taxes for the year 1891, on the properties mentioned in said bill, or seeks to bring into question the right of said defendant to collect the same or to raise any issue or issues with regard to said taxes or their legality, and especially as to so much of the prayer of said bill as may seek to restrain or enjoin defendant from proceeding to collect said taxes for the year 1891, pleads and says that on the 29th day of February, A. D. 1892, the said Louisville, New Orleans & Texas Railway Company, grantee of the said Natchez, Jackson & Columbus Railroad Company and subsequently, to wit, on the 25th day of October, 1892, consolidated into the said Yazoo & Mississippi Valley Railroad Company, exhibited its bill of complaint and filed the same in this honorable court against the defendant; setting up in said bill the alleged illegality of the identical same taxes on the same property for the same year 1891 the want of authority in defendant to collect the same, and praying that the collection of said taxes be enjoined; that this defendant filed his demurrer to said bill, and that thereupon such further and other proceedings were had in said cause which was and is numbered No. 1174 on
59 the general docket of this honorable court, that on the 22nd day of October, 1892, a final decree was rendered in this court sustaining said demurrer, dismissing said bill, and dissolving the injunction, and that at the same term of this court, the said complainant in said bill obtained an order allowing it an appeal from said final decree to the supreme court of the State of Mississippi, and that subsequently, to wit, on the 14th day of February, 1893, said cause No. 1174 was removed to the said supreme court and that said cause is now in said supreme court depending; all of which pleadings, proceedings and decree this defendant now here pleads in bar of the said bill of complaint herein so far as the same seeks to bring into question or raise any issue about or seeks relief against said taxes of 1891, and makes this said bill, demurrer and proceedings in said cause No. 1174, a part of this his plea as fully as if the same were incorporated herein, and alleges that in said last cause, No. 1174, all the rights of the parties to the present bill of complaint were fully settled as to said taxes for the year 1891 in this court. And so defendant prays the judgment of this honorable court whether he should be required to make any other or further answer to this present bill of complaint, as to said taxes for the year 1891 or the other matters herein pleaded against.

K. PALMER LANNEAU,
Sol. for Def't.

Sworn to and subscribed before me this 6th day of March, 1892.
ALLISON H. FOSTER, *Clerk.*

And as to all the rest, residue and remainder of the said bill of complaint of the complainants, other than those above answered by plea, the said defendant says he does demur thereto, and for causes of demurrer shows the following:

1. The said complainants have not in and by their said bill of complaint (as to said residue and remainder) made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed against this defendant.

2. It appears by complainants' own showing, in and by their said bill of complaint, that they are not entitled to the relief prayed against this defendant.

3rd. The allegations of said bill do not show any valid or sufficient reason why said sheriff and tax collector should be restrained or enjoined from proceeding to collect said taxes (of the year 1892) mentioned and sought to be enjoined in said bill of complaint.

4. The allegations of said bill do not show that complain-
60 ants or either of them are entitled to the so-called exemption from taxation alleged to have been granted to the said Natchez, Jackson & Columbus Railroad Company.

5. The said bill of complaint shows no cause or valid reason why the said defendant sheriff and tax collector aforesaid should have been or should be required or should now be compelled to give to complainants or either of them a receipt for said taxes of 1892 for which receipt is demanded in said bill and the prayer thereof.

K. PALMER LANNEAU,
Solicitor for Defendant.

I hereby certify that I believe the above and foregoing demurrer ought to be sustained.

K. PALMER LANNEAU,
Solicitor for Defendant.

In the Circuit Court of the United States for the Southern District of Mississippi. In Equity.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

This cause came on to be heard on the motion of defendants to discharge the restraining order heretofore granted, and to refuse the injunction as prayed for in the bill and both motions were heard together by consent, notice on both sides being waived, and the court, after hearing the pleadings, exhibits and evidence for and against, and arguments of counsel on both sides, after due consideration, finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged; and it is further ordered that the said motion to grant an injunction is overruled and the injunction refused.

It is further ordered that the clerk of said court enter this order on the minutes of said court.

Ordered, adjudged and decreed in chambers, this February 7th, 1899.

H. C. NILES,
U. S. Judge.

Filed and entered February 8th, 1899.

L. B. MOSELEY, *Clerk.*

61 UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

To the honorable the judges of the circuit court of the United States for the southern district of Mississippi, sitting at Jackson, in equity:

The above-named complainant, The Yazoo & Mississippi Valley Railroad Company, conceiving itself aggrieved by the decree made and entered on the — day of February, 1899, in the above-entitled cause, whereby the restraining order in said cause heretofore made was discharged, and whereby the motion of said complainant for a temporary injunction in this cause was refused, does hereby appeal from said order and decree, to the United States circuit court of appeals for the fifth circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which order was made duly authenticated, may be sent to the said United States circuit court of appeals for the fifth circuit, and meanwhile, that the appeal bond be fixed by your honors, and that said order discharging the restraining order in this cause be suspended pending said appeal.

This 8th day of February, 1899.

MAYES & HARRIS,
Sol'rs for Complainant.

Filed February 8th, 1899.

L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Assignment of Errors.

62 Comes the complainant in the above-entitled cause, and for error assigned herein, says that the decree in said cause, from which an appeal is prayed is erroneous, and against the just rights of said complainant for the following reasons:

1. Because on the bill and the proofs herein made the restraining order heretofore granted should not have been discharged.

2. Because on the bill and the proofs herein made, the motion for the issuance of a temporary injunction made by complainant should have been granted, and such temporary injunction should have been ordered to issue.

Wherefore, the said complainant prays that the said decree be reversed, and that the honorable judges of the circuit court may be directed to enter a decree overruling the motion of respondents to discharge said restraining order, and further granting the motion of complainant for the issuance of a temporary injunction in accordance with the prayer of the bill.

MAYES & HARR–S,
Sol'rs for Complainant.

Filed February 8, 1899.

L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Order Granting Appeal.

The complainant in this cause having prayed an appeal to the circuit court of appeals in and for the fifth circuit from the decretal order herein rendered whereby the restraining order heretofore issued is discharged and the temporary injunction prayed for in the original bill is refused, such appeal is hereby this day allowed, on the execution by the complainant herein of an appeal bond conditioned according to law in the penal sum of twelve hundred dollars, with at least two good sureties, such bond to be approved by the clerk of this court; and on the execution of such bond, said decretal order shall be superseded, pending said appeal, and said restraining order retained accordingly.

63 Ordered, adjudged and decreed this the 9th day of February, 1899.

H. C. NILES,
U. S. Judge.

Filed and entered February 9, 1899.

L. B. MOSELEY, *Clerk.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, Sitting at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
vs.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Know all men by these presents: That we, the Yazoo & Mississippi Valley Railroad Company, as principal and Samuel S. Carter and John Hart as surety, are held and firmly bound unto the defendants, Wirt Adams, State revenue agent, W. S. Wissenger, F. L. Hope, F. B. Fitzgerald, R. M. Edwards, J. B. Hebron, C. H. Walton, R. W. Smith, Dan. Hebron, R. C. McCay, C. C. Coffey, J. R. Jones, J. B. Turnipseed, J. M. Sessions, J. H. Sullivan, J. B. Humphreys, S. Duncan Baker, and W. T. Ratliff, sheriffs, etc., in the full and just sum of twelve hundred dollars to be paid to the said defendants, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of February, in the year of our Lord, one thousand eight hundred and ninety-nine.

Whereas, lately at a circuit court of the United States for the southern district of Mississippi, in a suit depending in said court between The Yazoo & Mississippi Valley Railroad Company, plaintiff, and the said Wirt Adams, State revenue agent, *et als.*, defendants, a decree was rendered against the said Yazoo & Mississippi Valley Railroad Company, and the said Yazoo & Mississippi Valley Railroad Company having obtained an appeal, and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a session of the United States court of appeals for the fifth circuit to be holden in the city of New Orleans, Louisiana, in said circuit, on the 18th day of February, 1899:

Now the condition of the above obligation is such, that if the said Yazoo & Mississippi Valley Railroad Company shall prosecute
64 said appeal to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation is void, else to remain in full force and virtue.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By MAYES & HARRIS, *Its Attorneys.*
SAM'L S. CARTER.
JOHN HART.

Approved:
[SEAL OF THE COURT.] L. B. MOSELEY, *Clerk.*

Filed February 9, 1899.

L. B. MOSELEY, *Clerk.*

Citation to U. S. Court of Appeals.

The United States Circuit Court of Appeals for the Fifth Circuit.

No. 561.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

To Wirt Adams, State revenue agent in and for the State of Mississippi; and W. S. Wissenger, sheriff of De Soto county; and F. L. Hope, sheriff of Tunica county; and F. B. Fitzgerald, sheriff of Coahoma county; and R. M. Edwards, sheriff of Bolivar county; and J. B. Hebron, sheriff of Washington county; and C. H. Walton, sheriff of Sharkey county; and R. W. Smith, sheriff of Issaquena county; and Dan. B. Hebron, sheriff of Warren county; and R. C. McCay, sheriff of Claiborne county; and C. C. Coffey, sheriff of Jefferson county; and J. R. Jones, sheriff of Franklin county; and J. B. Turnipseed, sheriff of Amite county; and J. M. Sessions, sheriff of Wilkinson county; and J. H. Sullivan, sheriff of Tallahatchie county; and J. B. Humphries, sheriff of Leflore county; and S. Duncan Baker, sheriff of Adams county; and W. T. Ratliff, sheriff of Hinds county, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the fifth circuit to be holden at the city of New Orleans, Louisiana, in said circuit, on the 18th day of February, 1899, pursuant to an
65 appeal filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein The Yazoo & Mississippi Valley Railroad Company, a corporation of the State of Mississippi, a citizen of said State, and domiciled therein, and resident in said State and district, is appellant and you are the appellees, to show cause, if any there be, why the decrees rendered against the said appellant, as in said appeal and assignment of errors therewith filed, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of United States, this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America the one hundred and twenty-third.

[Seal of the U. S. Circuit Court.]

L. B. MOSELEY, *Clerk.*

We hereby acknowledge service of the foregoing writ for all the defendants therein, this 10th day of February, A. D. 1899.

CRITZ, BECKETT & KIMBROUGH,
Solicitors for Defendants.

66 In the Circuit Court of the United States for the Southern District of Mississippi.

THE YAZOO AND MISSISSIPPI VALLEY R. R. Co.
v.
WIRT ADAMS, State Revenue Agent of the State of Mississippi, *et als.* } No. 561.

Come all of the defendants herein, by solicitors, and, entering appearance herein specially and only for the purposes of this motion, move the court to dismiss the original bill herein, and for ground assign that the sole object of said original bill was for an injunction, as therein shown, which injunction was by this court refused, and from the decree refusing said injunction an appeal was prayed and granted to the United States circuit court of appeals for the fifth circuit, which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court now here shown to the court.

CRITZ, BECKET & KIMBROUGH,
CALHOON & GREEN, *For Motion.*

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent of the State of Mississippi, —— —— R. R. Co. *et al.* } No. 561.

This day came on to be heard the motion of all the defendants herein to dismiss the original bill herein, and the court having considered the same, and it appearing to the court that solicitors for the complainant were present in court on the hearing of
67 said motion, and that they made no objection to the consideration of the same upon the ground that the mandate from the United States circuit court of appeals for the fifth circuit, dismissing said appeal for want of jurisdiction, has not been filed in this court, and the court being of opinion that said motion should be sustained, it is ordered, adjudged, and decreed that said motion be, and the same is hereby, sustained, and that said original bill herein be, and the same is hereby, dismissed, and that defendants go hence without *delay*, and that complainant be taxed with the costs of this proceeding, for which let execution issue at law; to which said order of dismissal complainant objected.

Ordered, adjudged, and decreed this first day of May, A. D. 1899.

H. C. NILES, *Judge.*

68 Circuit Court of the United States, Southern District of Mississippi, at the May Term, 1899.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Your petitioner, The Yazoo & Mississippi Valley Railroad Company, respectfully represents that there is manifest error committed,

to the injury of the petitioner, by the final decree pronounced in this cause on the first day of May, 1899, in and by which said final decree this court refused jurisdiction of this cause and dismissed the bill of the complainant finally for want of jurisdiction and pronounced judgment against the complainant for the costs of court.

Wherefore your petitioner, The Yazoo & Mississippi Valley Railroad Company, considering itself aggrieved, prays an order granting an appeal from said final decree refusing jurisdiction of this cause to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States approved March 3rd, 1891, and petitioner herewith files its bond in the penal sum of five hundred dollars; which bond petitioner prays to be approved by the Honorable Henry C. Niles, one of the judges of this court.

And your petitioner, as in duty bound, will ever pray.

MAYES & HARRIS,
Solicitors for Compl't.

THE YAZOO & MISSISSIPPI VALLEY RAILroad Company
v.
WIRT ADAMS, State Revenue Agent, ET ALS.
No. 561. Assignment of Errors.

69 Comes the appellant, The Yazoo & Mississippi Valley Railroad Company, in the above-entitled cause, and for error assigns as follows, to wit:

The court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same.

MAYES & HARRIS,
Solicitors for Appellant.

In the Circuit Court of the United States for the Southern District of Mississippi.

Know all men by these presents that we, the Yazoo & Mississippi Valley Railroad Company, as principal, and John Hart and Samuel S. Carter, sureties, are held and firmly bound unto Wirt Adams, State revenue agent, of Jackson, Mississippi, and the Railroad Commission of the State of Mississippi, and J. J. Evans and M. M. Evans and John D. McInnis, members of said commission, and Thomas C. Kimbrough, in the sum of five hundred dollars, to be paid to the said Wirt Adams, State revenue agent, or his successors in office and to the other obligees named; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Dated this the 3rd day of May, 1899.

Whereas the above-named Yazoo & Mississippi Valley Railroad Company has prosecuted an appeal to the Supreme Court of the United States to reverse a judgment rendered in a certain cause wherein the said appellant was complainant and the said Wirt

Adams and others were defendants, numbered 561 on the
70 equity docket of said court, of the said circuit court of the United States for the southern district of Mississippi, on the 1st day of May, 1899, in favor of said Wirt Adams, State revenue agent, and others, defendants, against the said appellant:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute its said appeal to effect and answer all costs and damages, or if it shall fail good to make its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE YAZOO & MISSISSIPPI VALLEY
RAILROAD COMPANY,
By EDWARD MAYES, *Attorney.*
JOHN HART.
SAMUEL S. CARTER.

Approved May 3, 1899.

H. C. NILES, *Judge.*

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by the Yazoo & Mississippi Valley Railroad Company, it is ordered that said appeal be granted, the bond therefor in the penalty of five hundred dollars having been executed and being approved by the court. This appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause. Unless counsel shall agree, by stipulation filed with the clerk of this court, in respect to the portions of the record to be transcribed and filed in the said United States Supreme Court under said appeal as prayed and granted, the appellant has
leave to present the record to the court on Saturday, the 6th
71 day of May, 1899, for the determination of what portion of the record shall be certified to said Supreme Court of the United States.

H. C. NILES, *Judge.*

UNITED STATES OF AMERICA, *ss:*

To Wirt Adams, State revenue agent, and to the Railroad Commission of the State of Mississippi, and J. J. Evans and M. M. Evans and John D. McInnis, members of said commission, and Thomas C. Kimbrough, clerk, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal in equity cause numbered 561, taken and allowed from the circuit court of the United States in and for the southern district of Mississippi, at Jackson, to the Supreme Court of the United States, at Washington, in the District of Columbia, wherein The Yazoo & Mississippi Valley

Railroad Company is the appellant and you are the appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in its petition for appeal is mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Niles, one of the judges of the said circuit court of the United States, this the 3rd day of May, A. D. one thousand eight hundred and ninety-nine.

H. C. NILES,
District Judge of the United States in and for the Southern District of Mississippi.

72 YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,
v.
WIRT ADAMS, State Revenue Agent, ET ALS., Appellees. } No. 561.

In the above-entitled cause, on the appeal of the Yazoo & Mississippi Valley Railroad Company to the Supreme Court of the United States, we do hereby waive issuance and service of citation as to all of the appellees, and agree to enter and do hereby enter appearance for them in the said Supreme Court, but said appearance may be either general or on a motion to dismiss.

R. C. BECKET,
Counsel of Record.

73 UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States at Jackson.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

I, Henry C. Niles, judge, presiding over said court at the May term, 1899, do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertaining to the jurisdiction of said court in said cause, and were in issue between the parties litigant and were discussed by counsel and considered by the court.

In the original bill filed herein the complainant alleged that it is a corporation duly organized and existing under the laws of the State of Mississippi, and that it was a tax-payer of the said State and of the district aforesaid.

It further alleged that all of the defendants to the bill were citizens and residents of the State of Mississippi and of this judicial circuit and of the said district.

The said bill further alleged that the Natchez, Jackson & Columbus Railroad Company was incorporated by the said State of Mississippi in the year 1870 for the purpose of building a railroad within the State of Mississippi, and that by this contract of incorporation, which was set forth in said bill, it was provided that the

taxes to which the said company should be subject for a period of thirty years from the date of its charter were appropriated and set apart and should be applied to the payment of the construction liabilities of said railroad, and that it was made the duty of the various tax collectors of the various counties in which said railroad should be liable to pay taxes, on the presentation in each
74 successive year of an affidavit made by the president or cashier of said company that during said year the said company had made payments on account of its construction debt to an amount equal to the taxes assessed, to deliver to the said company receipts for said taxes so assessed in full, which receipts so delivered should be a full acquittance and discharge of all taxes, State, county, and municipal, to which said company and its property should be subjected.

The said bill further set forth that in the year 1890 the legislature of the State of Mississippi authorized the said railroad company to sell all of its railroad property situated in this State to the Louisville, New Orleans & Texas Railway Company, together with all franchises, rights, powers, privileges, and immunities unto said railroad company appertaining and belonging.

The bill further alleged that the said sale was accordingly made by deed of conveyance executed in the month of March, 1890, whereby the said Louisville, New Orleans & Texas Railway Company became vested with said property and with the said rights, privileges, and immunities set forth.

The said bill further alleged that by an act of the legislature of the State of Mississippi approved March 3, 1882, and an act amendatory thereto, passed in the month of March, 1884, the said Louisville, New Orleans & Texas Railway Company was authorized to be formed, and that the same was in the year 1884 actually so formed, and that section 5 of the said act of March 3, 1883, which was the charter of the said Louisville, New Orleans & Texas Railway Company, provided exactly as the aforesaid charter of the Natchez & Jackson Railroad Company as follows: That all taxes to which said company should be subject for a period of twenty-five years from the date of the said charter were appropriated and set apart and should be applied to the payment of the construction liabilities of the
75 said railroad, and that it was made the duty of the various tax collectors of the various counties in which said railroad should be liable for taxes on the presentation in each successive year of an affidavit made by the president or cashier of the company that during the said year the said company had made payments on account of its construction debt to an amount equal to the taxes assessed, to deliver to the said company receipts for said taxes so assessed in full acquittance and discharge of all taxes, State, county, or municipal, to which said company and its property should be subject.

The said bill further alleged that on the 24th day of October, 1892, the said Louisville, New Orleans & Texas Railway Company and the defendant, The Yazoo & Mississippi Valley Railroad Company, by virtue of powers conferred upon them by their respective charters, consolidated with each other; and that by such consoli-

dation the said Louisville, New Orleans & Texas Railway Company was merged in the said Yazoo & Mississippi Valley Railroad Company, and its existence terminated while the existence of the said last-named company continued unimpaired and unbroken; and that by virtue of such consolidation the said property that had been the property of the Natchez, Jackson & Columbus Railroad Company became the property of said Yazoo & Mississippi Valley Railroad Company, with all the rights, privileges, and immunities appertaining thereto as hereinbefore stated, and also the railroad property that had been constructed by the said Louisville, New Orleans & Texas Railway Company, under its own proper charter, became the property of the said Yazoo & Mississippi Valley Railroad Company, with all the rights, privileges, and immunities pertaining thereto.

The said bill further alleged that the said right was embodied in said charter of the Natchez & Jackson Railroad Company by virtue of the sale of 1890, and the consolidation of 1892, as aforesaid,
76 transferred to and acquired by the complainant, and the right as embodied in and conferred by the charter of the said Louisville, New Orleans & Texas Railroad Company, so transferred to and acquired by complainant by and through the consolidation hereinbefore set forth, were contracts of appropriation to endure for the period stipulated therein, which were secured and guaranteed by the provisions of the Constitution of the United States, section 10, article I.

The bill further alleged that in the year 1898 the railroad commission of the State of Mississippi, who are by law made assessors of railway property for taxation and who are defendants to said bill, and Wirt Adams, State revenue agent of the said State of Mississippi, also made defendant, inaugurated a proceeding, under the statutes of the State of Mississippi passed in the year 1892 and in the year 1894, and under the said constitution of the State of Mississippi, section 180, adopted Nov. 1st, 1890, to assess taxes against the property aforesaid of the said Natchez, Jackson & Columbus Railroad Company, then being property, as aforesaid, of the Yazoo & Mississippi Valley Railroad Company, and also to assess taxes against the property, as aforesaid, that was the property of the Louisville, New Orleans & Texas Railway Company, constructed under its charter, as aforesaid, then being property, as aforesaid, of the Yazoo & Mississippi Valley Railroad Company, and to collect the same by process of law, in currency, by seizures under distress warrants and by suits thereupon brought by the said State revenue agent, and that said assessments had been made, amounting to about $140,000, and that such assessments and such seizures and suits would cause clouds upon the title of the complainant to said railway property, and would cause multiplicity of suits, and that there was no adequate remedy at law for the injuries to be suffered therefrom, and also that the collection of said taxes in currency and regard-
77 less of the rights of the complainant under its contract, as stated, would impair the obligations of the contracts of the

said complainant and cast clouds upon the titles of the properties of which it was the owner as aforesaid.

The bill further alleges that the proceeding of the said State revenue agent and the said railroad commission complained of in said bill was an attempt to enforce against the said charter rights of the said railroad, then held and enjoyed by the complainant, as hereinbefore set forth, and against the charter rights of the said Louisville, New Orleans & Texas Railway Company as to the said railroad constructed by it under its charter, then held and enjoyed by the complainant, as hereinbefore set forth, subsequent legislation of the State of Mississippi, to wit, the said statutes of 1892 and 1894 and the said section 180 of the constitution of 1890, and to impair the obligation of the contracts in said bill set forth by such enforcement of such subsequent legislation and said subsequent provision in said constitution; all in violation of section 10, article I, of the Constitution of the United States.

And also the said bill alleged that the attempt of the said railroad commission and the said revenue agent was to fasten upon the said railroad a paramount lien under the subsequently enacted statutes of said State which would displace the existing liens and mortgages upon said railroad and constitute a paramount lien thereupon as for unpaid taxes, and their proceedings to seize and sell the railroad thereunder constitute an effort to deprive the complainant of its property and its mortgage lien which secured the bonds belonging to the complainant without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

Upon said bill of complaint the undersigned, Henry C. Niles, judge, etc., did, on the 17th day of December, 1898, order the
78 issuance of a restraining order, which issued accordingly, and on the 17th day of January, 1899, the defendants, the State revenue agent and the railroad commission and their clerk, moved the court to discharge the said restraining order on the ground, amongst others, that the court had no jurisdiction to issue the same or to entertain the cause.

And at the same time the said complainants moved the court to issue a temporary injunction, as prayed in the bill.

Whereupon, on the 8th day *day* of February, 1899, the undersigned, as judge aforesaid, in vacation, made a decretal order discharging said restraining order and refused to grant a temporary injunction prayed for.

On the first day of May, 1899, being the first day of the May term, 1899, of the said circuit court, the said cause was finally dismissed by order of the court on the motion of said defendants, Wirt Adams, State revenue agent, and the said railroad commission and their said clerk; to which dismissal the complainant excepted.

Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the ground hereinbefore stated, namely:

1. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

2. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

The court having dismissed the bill on the ground of want of jurisdiction, the foregoing two questions, arising upon the
79 pleadings, the process, and the evidence, are hereby certified to the Supreme Court of the United States for its decision, in conformity with the fifth section of the act of Congress of the year 1891.

Certified to by me this the — day of May, 1899, being a day of the current May term, 1899, of the said circuit court of the United States.

H. C. NILES, *Judge*.

80 UNITED STATES OF AMERICA,
Southern District of Mississippi.

In the Circuit Court of the United States, at the May Term, 1899.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY
v.
WIRT ADAMS, State Revenue Agent, ET ALS. } No. 561.

In this cause, the parties not having filed in this court a written agreement in respect to the parts of the record to be certified to the Supreme Court of the United States, as provided for in the decree of this court dated May 3rd, 1899, it is therefore considered by the court that the portions of the record necessary to be certified to the Supreme Court in order to present properly the questions of jurisdiction certified to said court are as follows:

1. The caption of the minutes of this court.
2. Bill of complaint.
3. Contract between Natchez, Jackson & Columbus R. R. Co. and Louisville, New Orleans & Texas R. R. Co.
4. Fiat for injunction.
5. Bond for injunction.
6. Temporary restraining order.
7. Answer of sheriff of Wilkinson county.
8. Motion of revenue agent to quash restraining order.
9. Motion of complainant for injunction.
10. Agreement of counsel as to transcript and other matters.
11. Copy of act incorporating Miss. Valley Company.
12. Copy of bill of complaint of Mississippi Mills *v.* Cook, tax collector.
13. Copy of record from chancery court of Adams county in case of Natchez, Jackson & Columbus R. R. Co. *et al. v.* James W.
81 Lambert, sheriff and tax collector of Adams county.
14. Decree dissolving restraining order and refusing injunction.
15. Petition for appeal to circuit court of appeals.
16. Assignment of errors.
17. Order granting appeal to circuit court of appeals.

18. Appeal bond on appeal to circuit court of appeals.
19. Citation on appeal to circuit court of appeals.
20. Motion to dismiss bill.
21. Order dismissing bill.
22. Petition for appeal to Supreme Court.
23. Assignment of errors.
24. Appeal bond.
25. Order granting appeal.
26. Citation.
27. Agreement waiving certificate of citation.
28. Certificate as to question of jurisdiction.
29. This order, stating parts of record to be certified.

Ordered, accordingly, this the 16th day of May, 1899, being a day of the regular May term, 1899, of this court.

H. C. NILES, *Judge.*

[Endorsed:] 561. Yazoo & Miss. Valley R. R. Co. *v.* Wirt Adams, State revenue agent, *et als.* Order as to record. E. O. 7/241. Filed & ent. May 16, '99. L. B. Moseley, cl'k.

82 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Mississippi.

I, L. B. Moseley, clerk of the circuit court of the United States for the southern district of Mississippi, for the fifth circuit, sitting at Jackson, do hereby certify that the foregoing writing-, constituting eighty-one (81) pages, annexed to this certificate are full and true and correct copies of the originals in the case of The Yazoo & Mississippi Valley Railroad Company *v.* Wirt Adams, State revenue agent, *et als.* as the same appear on file and are of record in my office, and that they do constitute a true and perfect copy of the record in cause number 561, on the equity docket in said court, and of the assignment of errors and of all proceedings therein.

Seal U. S. Circuit Court, 5th Circuit, Southern District of Mississippi.

In witness whereof I have hereunto set my hand and the seal of this court this the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States one hundred and twenty-three.

L. B. MOSELEY, *Clerk.*

Endorsed on cover: File No., 17,434. S. Mississippi C. C. U. S. Term No., 320. The Yazoo and Mississippi Valley Railroad Company, appellant, *vs.* Wirt Adams, State revenue agent, & The Railroad Commission of the State of Mississippi *et al.* Filed June 2nd, 1899.

No. 948 77

Brf. of Guthrie, Fentress & Mayes

for Appt. (a

NOV 6 1899
JAMES H. McKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

NO. 948.

ON MOTION TO DISMISS OR AFFIRM.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

WASHINGTON, November 6, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 318.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The court is now asked to summarily dismiss an appeal involving serious questions as to the jurisdiction of the Circuit Court of the United States as duly certified by that court.[1] The questions are difficult, and they ought not to be disposed of without a hearing in court. Under no aspect could it be seriously argued that, within the language of the rule, "it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction

[1] I, Henry C. Niles, judge, presiding over said court at the May term, 1899, do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to the jurisdiction of said court in said cause, and were in issue between the parties litigant and were discussed by counsel and considered by the court.

[RECITAL OF BILL.]

On the 1st day of May, 1899, being the first day of the May term, 1899, of the said circuit court, the said cause was finally dismissed by order of the court on the motion of said defendants, Wirt Adams, State revenue agent, and the said Railroad Commission and their said clerk; to which dismissal the complainant excepted.

Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

depends is so frivolous as not to need further argument." Indeed, it may be said that the Circuit Court of Appeals of the Fifth Circuit, before which the question came on an appeal from an order discharging a restraining order, clearly intimated its own view that the court below had jurisdiction, and dismissed the appeal merely because it had no jurisdiction. *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

By this motion, however, the appellee seeks to precipitate a discussion involving much more than the jurisdiction of this court, and asks the court to decide, without oral argument, (1) as to the jurisdiction of this court, (2) as to the jurisdiction of the Circuit Court, (3) as to the possible jurisdiction of the Circuit Court of Appeals, (4) a question of *res adjudicata* never before determined here, and (5) the entire merits not only of this suit, but also of two other appeals (Nos. 319 and 320) and two writs of error (Nos. 244 and 324) on this docket, and of several suits yet pending undetermined in the state

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1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen and Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen and Nashville Railroad Company a party defendant in the cause.

2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision, in conformity with the fifth section of the act of Congress of the year 1891.

Certified to by me this the 16th day of May, 1899, being a day of the current term, 1899, of the said Circuit Court of the United States.

H. C. NILES,
Judge.

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courts of Mississippi. We venture to say that such a departure from fixed and orderly procedure is without parallel or excuse.

The appellant is asked to meet four grounds of motion, in support of which over one hundred and sixty authorities are cited, many of which are not in point, but a careful examination of all of which was requisite, and involved very much more labor than was at all necessary. Indeed, counsel for the appellee states that if the court "desires more light on any one point, they will find that our briefs in each of the cases Nos. 318, 319 and 320 are to some extent different, and made to reinforce each other." As matter of fact, although counsel for the appellant have received two briefs in No. 320, they have not yet received any briefs in No. 319. Of course, this practice ought not to be sanctioned on a motion of this character.

The points will be discussed in the order in which they are presented in the brief, but a short summary of the bill of complaint will enable the court to appreciate the real ground of jurisdiction in the Circuit Court; *i. e.*, of "suits of a civil nature, * * * in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under the Constitution or laws of the United States.*"[1] Jurisdiction was also claimed by reason of diversity of citizenship.

STATEMENT OF THE BILL.

The bill was filed by the appellant, a corporation of the State of Illinois, against the State Revenue Agent and the Railroad Commission of Mississippi, all citizens

[1]Act of August 13, 1888, c. 866, sec. 1, 25 Stat. 434.

of that state, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the same state. It set forth, among other things, the constitution of Mississippi of 1869, declaring that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," and that "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law"[1] (record, p. 2). It was averred that there was no constitutional or statutory provision reserving the right to repeal or amend charters granted by the legislature, nor had there been any such provision since the constitution of 1869, and that many exemptions from taxation had been granted to corporations which were in force at the time of the adoption of that constitution (*id.*, p. 3). The bill then specifically referred to the provision found in section 21 of the charter of the Mobile and Northwestern Railroad Company, approved July 20, 1870, appropriating and setting apart the taxes to which that company should be subject for thirty years to the payment of its construction debt and liabilities,[2] and showed that, at the same session, "all the rights, privileges, immunities and franchises granted by the act of incorporation of the said Mobile and Northwestern, embraced in the twenty-first section thereof," were conferred upon nine other railroad companies theretofore chartered. It was also alleged that the legislature, at its sessions between 1870 and 1878, passed many laws granting exemptions to corporations "for pecuniary profits," and particular mention was made of the act of April 1, 1872, entitled "An Act to encourage the introduction of

[1] Constitution Mississippi, 1869, Art. XII., sec. 20.
[2] Laws Mississippi, 1870, c. 104, sec. 21, p. 268.

Machinery and the establishment of Factories in the State of Mississippi,"[1] by which the state agreed with all manufacturing corporations having a capital stock of not less than ten thousand dollars that all taxes to which such companies should be subject for ten years were appropriated and set apart to the payment of debts incurred for construction and machinery (record, p. 4). The bill then set forth the decision and judgment of the Supreme Court of Mississippi in the so-called "Mississippi Mills case" (*Mississippi Mills* v. *Cook*, 56 Miss. 40) rendered in 1878, wherein that court construed the provisions of the constitution of 1869 already mentioned, and declared and settled the rule to be that those provisions did not require the legislature to tax the property of corporations for pecuniary profits, and that the words "subject to" in the constitution did not mean "subjected to," but rather that said "provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable to be taxed, if the legislature so wills; * * The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper." It was further stated that this adjudication had been followed and reaffirmed by the court in many cases since its rendition, and

> "has for twenty years been the settled law and rule of property of the said State, and has been adopted and acted upon by the legislative, the executive and the judicial departments of said State, and by the agents and officers of the said State, and the counties and municipalities therein, and under said settled law and rule of property, ***and upon the faith thereof***, enormous sums of money have been invested in said State, which otherwise would not have been so invested, and particularly the invest-

[1] Laws Mississippi, 1872, c. 73, p. 65.

> ments made by your orator, as hereinafter mentioned, and that many contracts, such as charter contracts with the State and other contracts between individuals or corporations, have been executed and acted upon, and the status of the parties changed so that they cannot now be restored; *all upon the faith of said settled law and rule of property*, among which are certain contracts hereinafter mentioned" (record, pp. 5, 6).

After alleging a continued course of legislative exemption of many corporations from taxation, the bill proceeds to show that the state railroad commission had never before denied the validity of the exemption of the Canton, Aberdeen and Nashville Company, nor attempted to assess that company for taxation; that the constitution of Mississippi, adopted in 1890, expressly provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions *as expressed in their respective charters*, or by the general laws, unless sooner repealed by the legislature" (Constitution 1890, sec. 181); and that successive legislatures had, since the adoption of that constitution, refused to repeal exemptions contained in charters theretofore granted (record, pp. 6, 7). It is alleged that the complainant, "relying in good faith on the constitution and law as settled in the Mississippi Mills case aforesaid, and the practical construction of said constitution of 1869, as aforesaid, by all the departments and officers of the said State," agreed to advance large sums of money toward building railroads in the state, if a charter exempting them from taxation for not less than twenty years were granted. The act incorporating the defendant Canton, Aberdeen and Nashville Railroad Company was accordingly passed, and became a law on February 17, 1882. Section 8 of that act was as follows:

> "That in order to encourage the investment of capital in the

works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances and all its property in this State necessary or incident to the full exercise of all the powers herein granted, not to include compresses and oil mills, shall be exempt from taxation for a term of twenty years from the date of the approval of this act, and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State; all of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State Treasury to be dealt with as the Legislature may direct, but said company shall be exempt from taxation by cities and towns."[1]

This charter also empowered the company to consolidate with other railroad companies, and to lease its railroads and other property, including immunities, for a term of years or in perpetuity (record, p. 8).

It is then alleged that, upon the faith of the foregoing interpretation of the constitution of Mississippi, the complainant "advanced the money to build and equip said Canton, Aberdeen and Nashville railroad, * * to wit, the sum of $2,536,924.13, and that the same was built with the money so furnished" and that a lease of the railroad so built, running to June 1, 1952, was, on March 31, 1888, executed to the complainant as authorized by the laws of the state; and that the complainant has since been and now is in possession of the property thereunder. The lease covered the railroad, franchises, immunities, etc., including the exemption from taxation. It is alleged that any assessment of the taxes will result in loss to the complainant, and that the levying of the taxes will

[1]Laws Mississippi, 1882, c. 554, sec. 8, p. 1009.

create a paramount lien upon the property superior to the complainant's rights and "violating * * the obligations of said charter contract, and said lease" (record, pp. 8, 9).

The bill expressly alleges that the charter (including the exemption), the right to lease, and the lease itself were contracts rightfully made "in view of the settled law as declared," and valid under the constitution and laws of Mississippi as previously expounded, and that the obligation of these contracts is binding as against any subsequent change of judicial decision (*id.*, p. 9). The bill also asserted the discretion of each legislature, under the state constitution, to determine what property should be subjected to taxation, and denied the constitutional power of any subsequent legislature to compel the payment of taxes retroactively, while not denying the power of the legislature to repeal the exemption in the charter as to future taxes (*id.*, pp. 9, 10). Many other charters containing similar exemptions are alleged to have been passed by the legislatures of 1882, of 1884 and of 1888, and a uniform public policy of inviting the investment of capital in railroad building by offering an exemption from taxation was deduced (*id.*, pp. 13, 14). It is shown that the railroad in question had cost up to June 30, 1897, $2,536,924.13, and the result of its operation between the years 1889 and 1897 showed an average yearly deficit of $129,892.89 (*id.*, pp. 14, 15, 16). No interest has been paid upon the mortgage bonds since January 1, 1889, and no dividends have ever been paid (*id.*, p. 16).

The bill then proceeded to show the execution of a mortgage on December 1, 1884, by the Canton, Aberdeen and Nashville Railroad Company upon its railroad and franchises, including the exemption, to secure $2,000,000 of bonds which were sold to the complainant, and a subse-

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quent mortgage securing $1,750,000 which were exchanged for a like amount of the former bonds, a note for the balance of $250,000 being secured by a subordinate mortgage. The latter bonds and the note were paid for in par, in good faith, and "as secured by a paramount lien, and in reliance upon the said sections of said charter as valid, and upon said mortgaged premises as being free from taxation for twenty years" (*id.*, pp. 17, 18).

Reference is then made to the long series of decisions of the Supreme Court of Mississippi in which the *Mississippi Mills* case had been followed;[1] and these decisions are alleged to have been overturned and overruled by the decision in *Adams* v. *Yazoo and Mississippi Valley Railroad Co.*, rendered June 20, 1898, where the court declared that the constitution of 1869, in respect of corporate taxation, meant the exact opposite to what it had been determined to mean in the *Mississippi Mills* case and the decisions which had followed that authority (*id.*, p. 19). It is alleged that the state revenue agent and the railroad commission have taken steps to levy taxes against the complainant and the Canton, Aberdeen and Nashville Railroad Company for all the years since 1886; that these taxes will be certified to the various collectors who will seize the property of the complainant and parts of the railroad; that the taxes are claimed to be a lien paramount to the mortgages and the lease, and that the alleged lien of the taxes is a cloud upon the title of the complainant as lessee and as creditor (*id.*, pp. 20, 21).

The bill specifically alleges that the acts of the defendants in creating and attempting to enforce the alleged lien

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[1] *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378, 394; *Y. & M. V. R. R. Co.* v. *Thomas et al.*, 65 Miss. 553, 562; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787.

for taxes are in violation of the obligation of the charter, of section 10 of Article I. of the Federal Constitution and of the Fourteenth Amendment (*id.*, p. 21); that the subsequent general revenue laws under which the revenue agent is acting are a violation of section 10 of Article I.; and that the lien resulting from the assessment of the taxes will deprive the complainant, and also the Canton, Aberdeen and Nashville Railroad Company, its stockholders and creditors, of property without due process of law (*id.*, p. 22). The complainant shows that it advanced the money to build the railroad, took the lease thereof, for which the exemption was a material consideration, and received the bonds, in view of the provisions of the constitution of 1869 and the interpretation thereof in the *Mississippi Mills* case in 1878, and avers that its rights cannot be impaired by subsequent change in such interpretation, stating that the *Mississippi Mills* case and other cases following it have created a rule of property which cannot be overturned so as to impair the complainant's rights under contracts which were valid when made (*id.*, p. 23).

It is further alleged that many suits have been begun by counties and towns for their shares of the back taxes claimed against other companies; that a like multiplicity of suits will be instituted against the complainant for such taxes, and that the county and town collectors have statutory authority to make seizures of property in order to effect summary collection. Payment under protest would only result in a multiplicity of suits to recover back the payments made. Any remedy at law would be of doubtful utility as to the counties and towns and ineffectual as against the state (*id.*, p. 23, 24).

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The prayer of the bill was, in substance, for a decree enjoining the approval and certification of the assessment of taxes, the beginning of suits for the recovery of such taxes, the taking of "any proceedings looking to the subjection of the property of your orator, or of the railroad known as the Canton, Aberdeen and Nashville railroad, to the payment of the taxes so claimed, as aforesaid, for the years 1886 to 1897, both inclusive," * * and declaring the property of the complainant and the Canton, Aberdeen and Nashville Railroad to be exempt from state and county taxation for such years, and that the charter contract of exemption be declared valid and binding as to state and counties for the term of twenty years, unless sooner repealed; that such assessment be decreed to to be null and void, and the cloud thereof removed; and for further relief (*id.*, pp. 26, 27).

So far as general equitable jurisdiction is concerned, the bill is thus seen to be founded upon two independent, but consistent, grounds; viz., the jurisdiction to avoid a multiplicity of suits at law and the jurisdiction to remove clouds from titles.[1] If, therefore, the allegations of the bill,

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[1] *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 840; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525; *Allen* v. *Baltimore & Ohio R. R. Co.*, 114 U. S. 311, 316; *Scott* v. *Donald*, 165 U. S. 107, 112; *Ogden City* v. *Armstrong*, 168 U. S. 224, 236; *Smyth* v. *Ames*, 169 U. S. 466, 516; *Norwood* v. *Baker*, 172 U. S. 269, 276; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *National Bank of Louisville* v. *Stone*, 174 U. S. 432.

The remedy of injunction has been frequently granted in Mississippi to restrain the collection of taxes from which the complainant was exempt. *Mobile & Ohio R. R. Co.* v. *Moseley*, 52 Miss. 127, 137; *Vicksburg Bank* v. *Worrell*, 66 Miss. 47, 50; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361, 365; *Railroad Co.* v. *Lambert*, 70 Miss. 779. The Annotated Code of 1892 provides (§ 483): "The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law." *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Bardon* v. *Land & River Improvement Co.*, 157 U. S., 327, 330; *Rich* v. *Braxton*, 158 U. S. 375, 405; *Smyth* v. *Ames*, 169 U. S. 466, 516.

none of which appears to be in any way in issue upon the record here, made a case within the jurisdiction of the Circuit Court as a federal court, that court was in error in dismissing the bill and the decree should be reversed. The proceedings in the Circuit Court of Appeals appear to be immaterial here, inasmuch as that court only passed upon questions affecting its own jurisdiction.

I.

The effect of the subsequent decree in the Mississippi State Court.

The first ground of the motion to dismiss is that this court will not sustain an appeal which is shown to be entirely unnecessary.

The suit was brought to restrain Wirt Adams, as State Revenue Agent, from enforcing certain tax laws of the State of Mississippi, which, as construed by the state court and given force by its later decisions, impaired the obligation of the contract relied on by the appellant. The State Revenue Agent was specially charged with the collection of such taxes and given a large pecuniary interest therein. Within the authorities cited under point IV., the suit was not within the inhibition of the Eleventh Amendment.

The court below held that it had no jurisdiction upon three grounds—that there was no diversity of citizenship, that there was no federal question, and that the suit was against a state; and dismissed the bill accordingly, but certified the question of jurisdiction to this court. After the commencement of the suit, but before the final decree dismissing the bill, and while an application for a rehearing was pending undetermined in the Circuit Court of Appeals, the State Revenue Agent commenced suit in a state court to collect the taxes, and such proceedings were

had that a decree for the taxes in question was entered in the Chancery Court for Clay County against both the Canton, Aberdeen and Nashville Railroad Company, and the Illinois Central Railroad Company, the appellant here. The defendants appealed, as authorized by the state practice, to the Supreme Court of the State of Mississippi, and on such appeal, as the affidavit of Mr. Edward Mayes on file shows, gave a full supersedeas bond. The question for this court is whether this judgment, although duly appealed from and covered by a supersedeas bond, ousts the federal court of jurisdiction, notwithstanding that the judgment in the state court may be reversed and declared a nullity, in which event the appellant in this case would have to begin a new suit in the United States Circuit Court to obtain the same relief. This point of the effect of the judgment so appealed from and covered by a supersedeas bond is undoubtedly a difficult and close one. It is, however, a question which has never been decided by this court. On the contrary, in a case at the last term where the point was presented, the court found that it was not necessary to consider the authorities which hold that a perfected appeal substantially vacates or suspends the judgment below. *Hubbell* v. *United States*, 171 U. S., 203, 210.

Numerous cases are cited by the appellee to sustain the proposition that a judgment, although an appeal has been taken accompanied by a *supersedeas*, is yet available in support of a plea of *res adjudicata*. Many of the cases thus cited utterly fail to sustain the proposition; and authorities of great respectability may be referred to where the precise point has been ruled the other way. *Woodbury* v. *Bowman*, 13 Cal. 634; *People* v. *Treadwell*, 66 Cal. 400, and cases

cited; *Spears* v. *County of Modoc*, 101 Cal. 303, 304; *Glenn* v. *Bursh*, 3 Colo. 26, 36; *Card* v. *Foot*, 57 Conn. 427, 431; *Sharon* v. *Hill*, 26 Fed. Rep. 337, 345; *Byrne* v. *Prather*, 14 La. Ann. 653; *Day* v. *De Jonge*, 66 Mich. 550; *Ketchum* v. *Thatcher*, 12 Mo. App. 185; *Haynes* v. *Ordway*, 52 N. H. 284; *Hall* v. *Calvert*, 46 S. W. Reporter, 1120, 1125; *Railroad* v. *Brigam*, 95 Tenn. 624.

The effect of an appeal in admiralty has always been to suspend the sentence altogether, so that it could not be used as *res adjudicata* until the determination of the appeal. *Yeaton* v. *The United States*, 5 Cranch, 281, 283; *Souter* v. *Baymore*, 7 Pa. St. 415, 417. See also, *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

Even where it has been held that a judgment from which an appeal had been taken was still available to support a plea of *res adjudicata*, it has nevertheless been conceded that such a plea could not be availed of so as to work an injustice, and therefore that in proper cases execution upon a judgment obtained upon such a plea would be stayed to await the event of the appeal. Durfee, C. J., said in *Paine* v. *Schenectady Insurance Co.*, 11 R. I. 411, 416:

> "We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time."

See, also, *Scott* v. *Pilkington*, 2 Best & Smith, 11, 41; 1 Tidd's Prac. (3d. Am. Ed.) 530 *et seq.*; *Newcomb* v. *Drummond*, 4 Leigh, 58.

If the motion to dismiss should be granted on the ground now discussed, the court will have given the decree of the Chancery Court of Clay County, Mississippi,

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a "permanently conclusive effect," and will have ousted its own jurisdiction and that of the Circuit Court of the United States to hear and determine the cause.

We are not concerned here with the doctrine of *res adjudicata* as a matter of strict right. The motion in this respect is addressed to the discretion of the court. That discretion should not be so exercised as to impair the jurisdiction unless it is perfectly clear that in no possible event can the appellant prevail upon a hearing on the merits of the court below. *Non constat* but that, by the time we are heard upon the merits in the Circuit Court, the Supreme Court of Mississippi may have reversed the judgment in the principal case, thus setting the alleged estoppel at large, and opening the way to appellant's ultimate success. These questions are important. They have never yet been directly settled in this court, and should be postponed to the hearing on the merits. The validity of appellant's claim to an exemption can then be settled for the future as well as for the past, and the litigation finally determined. *United States* v. *Freight Association*, 166 U. S. 290, 307.

In *Reilly* v. *Bader*, 50 Minn. 199, 203, the court refused to consider the point of *res adjudicata* upon a motion, saying: "Without questioning the correctness of counsel's position in respect to the conclusiveness, generally, of the first final judgment between the same parties and their privies, touching the same subject-matter, it is perfectly obvious that the object sought for by him cannot be attained by means of a motion. Such practice is unheard of." Moreover, the defendants are proceeding with their suits in the state courts and cannot possibly be prejudiced in any aspect by the delay necessary to secure for this question of jurisdiction the attention its impor-

tance merits. See *Marsh* v. *Shepard*, 120 U. S. 595, 597, where the motion was based upon a very similar ground.

II.

Jurisdiction of this Court.

The appeal to this court was prayed under the first clause of section 5 of the act of March 3, 1891 (record, p. 44). The only error assigned was that "the court erred in dismissing the bill * * for want of jurisdiction to entertain the same" (*ib.*). The allowance of the appeal stated: "This appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). In accordance with the practice followed in *Shields* v. *Coleman*, 157 U. S. 168, the Circuit Court reserved to itself the determination of the question as to the portions of the record to be sent up in case counsel should not agree (record, p. 465). The certificate, which was based upon that approved in *Colvin* v. *Jacksonville*, 158 U. S. 456, 458, stated the three questions of jurisdiction involved, recited that the bill was dismissed for want of jurisdiction, and formally certified the three questions already stated (record, pp. 47–49). Even without the certificate, the question of jurisdiction sufficiently appeared. *In re Lehigh Min. & M'f'g Co.*, 156 U. S. 322, 327; *Shields* v. *Coleman*, 157 U. S. 168, 176; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 219; *Smith* v. *McKay*, 161 U. S. 355, 357.

If the Circuit Court was right in holding that there was no diversity of citizenship sufficient to sustain the jurisdiction, that only left the case as if no such diversity had ever been claimed. There was another independent and substantial ground of jurisdiction arising from the subject matter of the suit, namely that the case arose under the Constitution of the United States, and the

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two remaining questions which have been certified are sufficient to sustain the jurisdiction of this court to entertain the appeal. Both questions go to the jurisdiction of the Circuit Court "as a court of the United States" (*Blythe* v. *Hinckley*, 173 U. S. 501, 507). The second ground certified—that "the bill set forth no particular federal question"—could relate to nothing but the jurisdiction conferred by section one of the act of August 13, 1888. The third ground certified—that the "bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment"—related as clearly to the jurisdiction of the court as a federal court. The language of the Eleventh Amendment is expressly directed to the "judicial power," *i. e.*, jurisdiction, power to hear and determine, of the courts of the United States.

> "The *Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment does not effect a limitation upon the jurisdiction of courts in general, but operates only upon the "judicial power" of the United States which can be exercised through the medium and jurisdiction of the Federal courts alone; and it deals with the question of power *vel non*, and not with the method of the exercise of that power. The question of jurisdiction in this respect is pre-eminently one of federal cognizance. This court very lately said, where the same point was involved: "The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance *consistently with the Constitution of the United States.*" *Fitts* v. *McGhee*, 172 U. S. 516, 524.

The 94th rule in equity has nothing to do with the

case presented here. The complainant does not sue as a stockholder, nor is the bill founded on rights of the Canton, Aberdeen and Nashville Railroad Company. The suit is brought to enforce and protect the complainant's vested rights, as lessee of the property, to the exemption granted by the contract (record, pp. 8, 9). The power to make a lease which should include the exemption was expressly granted by the charter containing that immunity (*id.* p. 8). The alleged lien of the taxes sought to be imposed will, if enforced, be paramount to the lease to the complainant (*id.* pp. 20, 21).

The questions of the jurisdiction of the court below, as a federal court, appear so clearly and conclusively upon the record, that it is not deemed necessary to follow the appellee further in his argument upon this point, the entire relevancy of which is not perceived.

III.

Jurisdiction and power of the Circuit Court.

The bill of complaint presented a case clearly within the jurisdiction of the Circuit Court. The contract embodied in the charter of the Canton, Aberdeen and Nashville Railroad Company and the subsequent contract of lease between that company and the complainant were set forth, and it was specifically charged that the subsequent legislation of the state had impaired those contracts and the rights resulting therefrom (record, p. 22). This was all that was necessary to sustain the jurisdiction as of a case arising under the Constitution of the United States.

In the recent case of *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, Mr. Justice Brown had occasion to lay down the rule as follows (p. 562):

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"There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that *jurisdiction depended upon the allegations of the bill*, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

"ALL THAT IS NECESSARY TO ESTABLISH THE JURISDICTION OF THE COURT IS TO SHOW THAT THE COMPLAINANT HAD, OR CLAIMED IN GOOD FAITH TO HAVE, A CONTRACT WITH THE CITY, WHICH THE LATTER HAD ATTEMPTED TO IMPAIR. * *

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88."

The jurisdiction of the federal courts has been invoked in many similar cases: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674; *Tammany Water Works* v. *N. O. Water Works*, 120 U. S. 64; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1.

In *Smyth* v. *Ames*, 169 U. S. 466, 518, Mr. Justice Harlan said:

"These are cases of which, so far as the plaintiffs are concerned, the Circuit Court has jurisdiction * * upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, *the cases may be regarded as arising under that instrument.*"

The case being thus within the jurisdiction of the

federal courts by reason of its subject matter, those courts will apply the same rules of decision as if jurisdiction were based upon diverse citizenship. Nothing is better settled than that the federal circuit courts, in the exercise of their original jurisdiction, and this court, upon appeal from their decisions, are not bound by state decisions in cases where rights have been acquired in reliance upon the law as expounded at the time by the state tribunals. No subsequent change of judicial opinion has been permitted to impair those rights. This has never been the subject of doubt in this court since the decision in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 206, where Mr. Justice Swayne said:

> " 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts altering the construction of the law.* The Ohio Life & Trust Co. v. Debolt, 16 Howard, 432.'
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> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[1]

Jurisdiction is not, of course, claimed because of the judicial impairment of the complainant's contract rights. No such idea is entertained. But jurisdiction is claimed

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[1] The following cases illustrate the doctrine: *Meyer* v. *The City of Muscatine*, 1 Wall. 384, 393; *Havemeyer* v. *Iowa County* 3 Wall. 294, 303; *Mitchell* v. *Burlington*, 4 Wall. 270, 274; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *The City* v. *Lamson*, 9 Wall. 477, 485; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Supervisors* v. *United States*, 18 Wall. 71, 82; *Boyce* v. *Tabb*, 18 Wall. 546, 548; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 678; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294; *Ober* v. *Gallagher*, 93 U. S. 199, 207; *Commissioners*, etc., v. *Thayer*, 94 U. S. 631, 642; *Douglass* v. *County of Pike*, 101 U. S. 677, 686, 687; *Thompson* v. *Perrine*, 103

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because a legislative impairment of those rights makes a case arising under the Constitution of the United States and within the original jurisdiction of the Circuit Courts of the United States. In administering that jurisdiction the federal courts will protect the complainant against any impairment of the rights which it has acquired in reliance upon the laws of the state as declared, although in so doing they may run counter to a subsequent change in judicial opinion.

"In that case [*Gelpcke* v. *City of Dubuque*] it was held, that if the contract, when made, was valid by the constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature *or judiciary* can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it." Mr. Justice Swayne in *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303.

"After the decision of this court in the case of *Gelpcke* v. *The City of Dubuque*, 1 Wall., 176, 223, and the series of cases following it, we must decline a re-examination of the question. We regret the difference of opinion on the subject of these bonds, between this court and the courts of the State of Iowa; but it involves a principle and rule of property, in our opinion, so just, and so essential to the protection of the rights of the *bona fide* holder of this

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U. S. 806, 816; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 72; *County of Ralls* v. *Douglass*, 105 U. S. 728, 731; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Green County* v. *Conness*, 109 U. S. 104, 105; *Carroll County* v. *Smith*, 111 U. S. 556, 562; *Anderson* v. *Santa Anna*, 116 U. S. 356, 361; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *German Bank* v. *Franklin Co.*, 128 U. S. 526, 538; *Clark* v. *Bever*, 139 U. S. 96, 117; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 99; *Folsom* v. *Ninety-Six*, 159 U. S. 611, 627; *Wade* v. *Travis County*, 174 U. S. 499, 507.

class of securities, that, however much we may respect the judgment of those differing from us, we cannot give up our own." Mr. Justice Nelson in *Lee County* v. *Rogers*, 7 Wall. 181, 183.

"This court has always ruled that if a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature *or the judiciary* will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule." Mr. Justice Strong in *Olcott* v. *The Supervisors*, 16 Wall. 678, 690.

"When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the State lifted its voice against them. *The acquiescence was universal.*

"The general understanding of the legal profession throughout the country is believed to have been that they were valid. The National Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the

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most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." Mr. Justice Swayne in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 677, 678.

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." Mr. Chief Justice Waite in *Douglass* v. *County of Pike*, 101 U. S. 677, 687.

"When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent." Mr. Justice Grier in *Pease* v. *Peck*, 18 How. 595, 599.

"Rights acquired on the strength of the former decision ought not to be lost by a change of opinion in the court." Mr. Justice Davis in *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294.

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its legislature to pass an act impairing its obligation, *much less could any decision of its courts have that effect.*" Mr. Justice Nelson in *Chicago* v. *Sheldon*, 9 Wall. 50, 55.

The true and sound distinction between cases originating in the federal courts and those coming to this court on writ of error to a state court has been most clearly illustrated in the cases of *Central Land Company* v. *Laidley*, 159 U. S. 103, 111, and *Bacon* v. *Texas*, 163 U. S. 207, 221.

IV.

THE SUIT IS NOT ONE AGAINST A STATE.

The true ground of decision upon this point has been lately pronounced by this court in *Fitts* v. *McGhee*, 172 U. S. 516, where Mr. Justice Harlan, after observing (p. 525) that "what is and what is not a suit against a State has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question," proceeded to distinguish a suit against officers of a state, as such, to restrain them from enforcing laws of the state which imposed no special duty upon them, from a suit to restrain state officers "specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights" (p. 529.) The opinion continues as follows (*ib.*):

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

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Herein lies a wide distinction between *Fitts* v. *McGhee* and similar cases, and the case at bar, where the statutes which are alleged to impair the obligation of the contract not only "specially charge" upon the State Revenue Agent the duty of enforcing their provisions, but even create the very office itself. As to the appellant, these statutes are void, and so they can confer no valid power or authority upon the incumbent of the office in respect of the appellant's property. His action, to this extent, being based upon an unconstitutional and void statute, is itself lawless, and there is ample jurisdiction to restrain him from proceedings which will cause the appellant irreparable injury by involving it in a multiplicity of suits and casting cloud upon its title. The case is within the rule laid down by this court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, 67; and *Smyth* v. *Ames*, 169 U. S. 466, 518. The railroad commission is also specially charged with the duty of assessment, certification and revision by the same statutes which, as to the appellant, are powerless to confer any constitutional authority.[1]

It is also to be observed that, under section 3880 of the Mississippi Annotated Code of 1892, the assessment rolls were required to be so made "that each county, levee district and municipality shall receive its just share of such taxes proportionately to the amount of property therein situated," and under the Act of February 7, 1894, creating the office of State Revenue Agent, that official has a

[1] In *Poindexter* v. *Greenhow*, 114 U. S. 270, 288, the defendant sought to substitute the State in his place under cover of unconstitutional state legislation. This court brushed the attempt aside, thus referring to the unconstitutional law:

"That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done."

"right of action" where the "state, or any county, municipality or levee board has the right of action or may sue" (Laws Mississippi, 1894, p. 29). The state was therefore not the only party in interest in collecting these taxes, its interest is comparatively small, and the counties, municipalities and levee boards have the substantial interest in the subject matter. There is no constitutional inhibition against such suits against municipal corporations or their representatives. *Lincoln County* v. *Luning*, 133 U. S. 529.

CONCLUSION.

For these reasons it is urged that the very serious questions of jurisdiction presented by this appeal should be reserved until they can be argued at the bar of this court.

Washington, November 6, 1899.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

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No. 318. 77

Affidavit for Appr.

Filed Nov. 6, 1899.

Supreme Court of the United States.

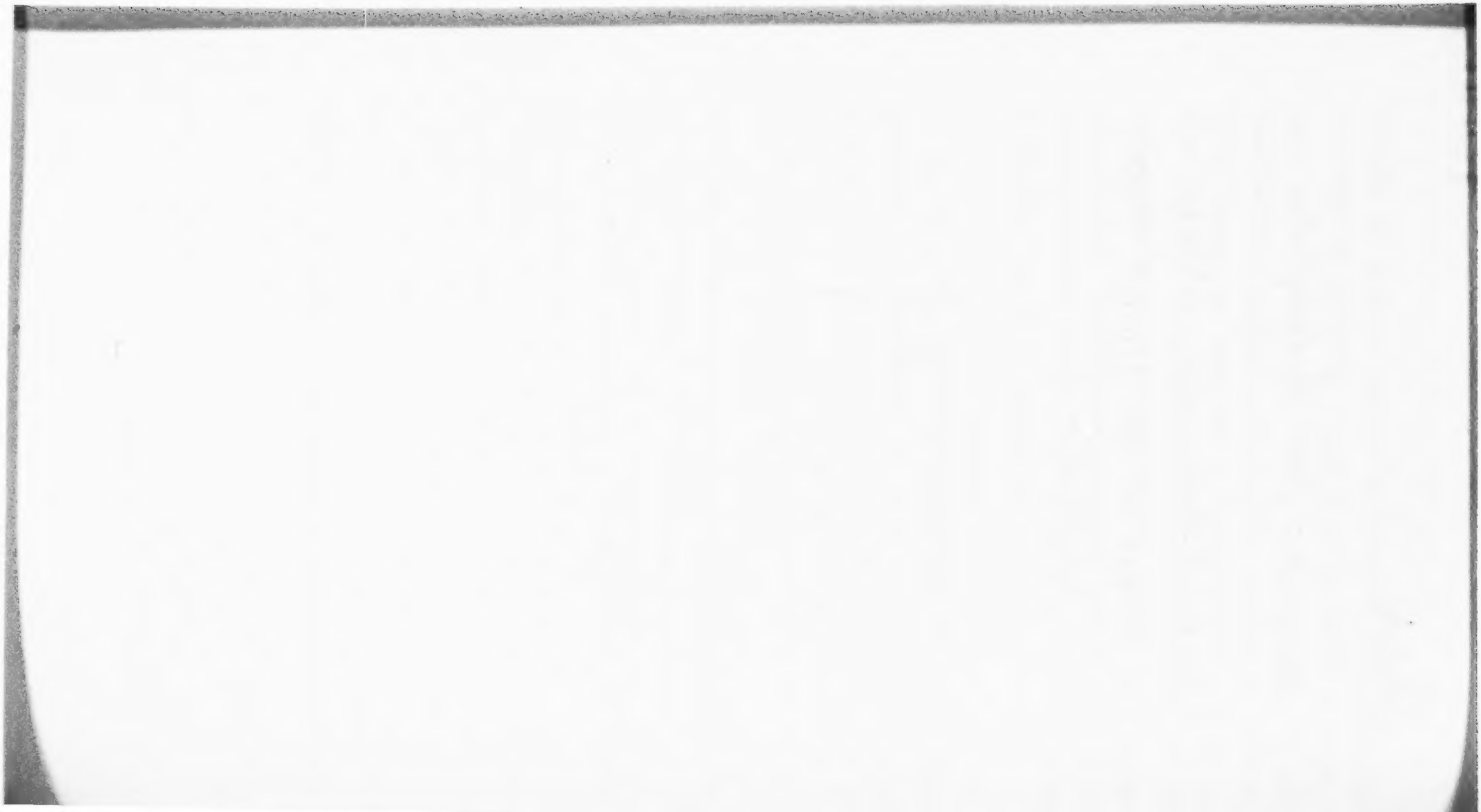
OCTOBER TERM, 1899.

NO. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et als.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

AFFIDAVIT OF EDWARD MAYES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.



STATE OF TENNESSEE, }
Shelby County. }

Personally appeared before me Sam Holloway, a Notary Public, in and for the County and State aforesaid, Edward Mayes, attorney at Law, of Jackson, Mississippi, who being by me duly sworn, on oath says: That a certain suit in Chancery was brought by Wirt Adams, State Revenue Agent of the State of Mississippi, in the Chancery Court of Clay County, Mississippi, on the 26th day of April, 1899, to recover back taxes assessed by the Board of Railroad Assessors of the State of Mississippi, against the railroad property of the Canton, Aberdeen & Nashville Railroad Co., in and for the years of 1886 to 1897 inclusive; that the said demand so sued on by the said State Revenue Agent, was the same identical demand as to which the Illinois Central Railroad Co. had filed theretofore its bill of injunction in the United States Circuit Court, at Jackson, Mississippi,—on which bill of injunction such proceedings were had that the said bill of injunction was finally dismissed by the said United States Circuit Court on or about the first Monday of May, 1899, from which decree of dismissal the said Illinois Central Railroad Co. prayed an appeal to the Supreme Court of the United States, which appeal is now pending in said Supreme Court of the United States, and is numbered 318 on the October Docket, 1899; that the said bill in Chancery so filed in the Chancery Court of Clay County, Mississippi, was afterwards amended by the said State Revenue Agent, so as to include additional taxes on the same property for the year 1898; that as so amended, the said Chancery cause was set for hearing conformably to the laws of the State of Mississippi, before the Chancellor, on the Bill and Answer;

that having heard the same, the Chancellor rendered a decree in favor of the complainant for all of said taxes hereinbefore mentioned, amounting to the sum of over Ninety-eight Thousand ($98,000) Dollars; that from said decree the defendants, who were the Canton, Aberdeen & Nashville Railroad Co., and Illinois Central Railroad Co.—prayed their appeal in due form, to the Supreme Court of the State of Mississippi, which was granted with supersedeas, upon the execution of the usual supersedeas bond in double the amount of the decree, and said judgment superseded as the law of Mississippi, in such case, provided; and the said appeal is now pending, so superseded, before the Supreme Court of the State of Mississippi.

EDWARD MAYES.

Sworn to and subscribed before me, this 30th day of October, 1899.

SAM HOLLOWAY,
Notary Public.

[NOTARIAL SEAL.]

11 - 18 - 79

No. 318, 319 & 320.

Office Supreme Court U.S.
FILED
MAR 12 1900
JAMES H. McKENNEY,
Clerk.

MISSISSIPPI TAX CASES.

Motion to Advance.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 12, 1900.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *v.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 318.
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *v.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 319.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*, *v.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 320.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error*, *v.* WIRT ADAMS, State Revenue Agent.	No. 324.

MOTIONS TO ADVANCE AND NOTICE THEREOF.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellants and plaintiff in error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 318.
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 319.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 320.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error*, v. WIRT ADAMS, State Revenue Agent.	No. 324.

NOTICE OF MOTIONS TO ADVANCE FOR HEARING AFTER YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., V. WIRT ADAMS, STATE REVENUE AGENT (No. 244).

Notice is hereby given that, upon the records in the above entitled cases in this court, the annexed motions to advance the same and set them down for hearing after *Yazoo & Mississippi Valley Railroad Company et al.*, v. *Wirt Adams, State Revenue Agent* (No. 244), will be pre-

sented and submitted to the Supreme Court of the United States at the Capitol in the City of Washington, on Monday, the 12th day of March, 1900, at the opening of court on that day, or as soon thereafter as counsel can be heard.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,

Of counsel for appellants and plaintiff in error.

To

MARCELLUS GREEN, ESQ., and
R. C. BECKETT, ESQ.,

Of counsel for appellees and defendant in error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 318.
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 319.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*, v. WIRT ADAMS, State Revenue Agent, *et al.*	No. 320.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Plaintiff in Error*, v. WIRT ADAMS, State Revenue Agent.	No. 324.

MOTIONS TO ADVANCE FOR HEARING AFTER YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., V. WIRT ADAMS, STATE REVENUE AGENT, (No. 244).

The above-entitled cases involve different phases of the alleged liability to taxation of the Illinois Central and Yazoo and Mississippi Valley Railroad Companies under certain charters and legislation of the State of Mississippi.

The writ of error in No. 244 brings up for review a judgment of the Supreme Court of that State for $548,676 taxes and $27,433 penalty, and involves the constitutionality of state legislation enacted in the years 1886, 1892 and 1894, which the plaintiffs in error contend impairs the contract obligations of the charters of certain railroad companies now merged in the Yazoo and Mississippi Valley Railroad Company. A motion to dismiss or affirm was postponed until the hearing upon the merits, and a motion to advance has been denied at this term.

Nos. 318, 319 and 320 are appeals from the Circuit Court of the United States for the Southern District of Mississippi, and at present merely involve the jurisdiction of the Circuit Court in these cases, that question alone having been certified under section five of the act of March 3, 1891, (26 Stat. 826). The inquiry is whether the subject matter of the causes was within the jurisdiction of the federal court, and also whether the suits were in violation of the Eleventh Amendment to the Federal Constitution.

No. 318 was begun by the filing of a bill in equity by the Illinois Central Railroad Company for the purpose of restraining the levy and collection of taxes for the years 1886 to 1897 alleged to be in violation of the charter of the Canton, Aberdeen and Nashville Railroad Company, which granted an absolute exemption for a term of twenty years, differing in this respect from the charter involved in No. 244, which provides for an appropriation and application of taxes to the payment of construction debt. A motion to dismiss or affirm in this case has also been postponed.

No. 319 was begun by the filing of a bill in equity by the Illinois Central Railroad Company to restrain the

assessment and collection of taxes alleged to be in violation of the charter of the Natchez, Jackson and Columbus Railroad Company for the years 1886 to 1891, and involves the same question of the validity of the provision for the appropriation and application of taxes to the payment of construction debt as is presented in No. 244.

No. 320 is a suit by the Yazoo and Mississippi Valley Railroad Company to restrain the collection of taxes and to set aside levies thereof alleged to be in violation of its charter and of that of the Natchez, Jackson and Columbus Railroad Company, which question involves the rights of the Yazoo and Mississippi Valley Railroad Company under a provision in the charter of the Louisville, New Orleans and Texas Railway Company respecting the appropriation and application of taxes similar to that involved in No. 244. A motion to dismiss or affirm in this case has also been postponed.

No. 324 involves the construction of a part of the same legislative charter that was before the court in *Yazoo Railroad Company* v. *Thomas*, 132 U. S. 174, 184, the question being whether the exemption from municipal taxation contained in the last clause of section 8 of the original charter of the Yazoo and Mississippi Valley Railroad Company is absolute, or whether it is conditioned upon the completion of the railroad to the Mississippi River. The court held in the case cited that as to state and county taxation the exemption was so conditioned; and the present writ of error presents a somewhat limited question of statutory construction. A motion to dismiss or affirm in this case has also been postponed.

It will thus be seen that the records in these five cases present in varying forms the validity of claims to ex-

emption or to appropriation of taxes in payment of construction debt, arising under three distinct classes of legislation: *First*, that providing for the appropriation and application of taxes of railroad companies to the payment of construction debt; *second*, the absolute exemption from taxation contained in the charter of the Canton, Aberdeen and Nashville Railroad Company; *third*, the alleged liability to municipal taxation under the original charter of the Yazoo and Mississippi Valley Railroad Company, as distinguished from state and county taxation.

These questions, while so far differing in substance as to require separate oral argument and independent briefs, are yet so united on account of the identity of parties and the general character of the constitutional and statutory questions involved, as in the opinion of the subscribers to justify these motions to advance the four cases appearing later upon the calendar and to set them down for hearing immediately after argument has been had in No. 244. It is conceived that this manner of hearing the cases will lighten the labors of the court, by facilitating a clearer view of the distinction between the issues involved in the several suits than if the cases should be left to be heard at intervals from each other. But it is believed that if they should be argued together it would tend to confusion and to the risk of overlooking the distinctions between the cases.

The amounts involved in the whole litigation, which may possibly be terminated by the judgments in these cases, are very large, aggregating upwards of $1,200,000. The questions presented are also deemed to be novel and important, this court never before having been asked to determine them.

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Altogether, the circumstances seem to be so special and peculiar as to warrant the application now made.

WASHINGTON, March 12, 1900.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,

Of counsel for appellants and plaintiffs in error.

Office Supreme Court, U.S.
FILED
APR 4 1900
JAMES H. McKENNEY,
Clerk

No. 308.

Opp. of Guthrie, Mayes, Fentress &

MISSISSIPPI TAX CASES.

Dickinson for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 308.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899.

10012

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 318.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 43) which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the act of March 3, 1891 (*id.* pp. 44, 45), and the judge holding the circuit court certified as follows:

"The question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen & Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen & Nashville Railroad Company a party defendant in the cause.

"2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

"3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States.

"The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision, in conformity with the fifth section of the act of Congress of the year 1891" (record, p. 49).

Motions in this court to dismiss or affirm were submitted on November 6, 1899, and the decision postponed to the hearing on the merits. The jurisdiction of the circuit court is claimed on the ground that the suit is one "of a civil nature, . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under the Constitution or laws of the United States.*"[1] Jurisdiction is also claimed by reason of diversity of citizenship (record, pp. 1, 2). The question, therefore, is whether, on the allegations of this bill of complaint, a case within the jurisdiction of the United States courts was duly presented. We are not concerned with the merits or what conclusion the court might come to on the points of law. If, on the allegations of this bill, a case was shown within the jurisdiction of the federal court, the complainant is entitled as matter of right to have its day in that court.

Statement of the case.

The bill was filed by the appellant, a corporation of the State of Illinois, against Wirt Adams, as state revenue agent, and the railroad commission of Mississippi and its clerk, all citizens of that state, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the same state, to restrain the enforcement of taxes the imposition of which was alleged to impair a contract in the charter of the last-named company exempting its property from taxation, and to be also violative of the Fourteenth Amendment.

[1] Act of August 13, 1888, 25 Stat. 434.

This charter was in the act incorporating the defendant Canton, Aberdeen and Nashville Railroad Company which was passed and became a law on February 17, 1882. Section 8 of that act was as follows:

> "That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances and all its property in this State necessary or incident to the full exercise of all the powers herein granted, not to include compresses and oil mills, shall be exempt from taxation for a term of twenty years from the date of approval of this act, and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State: all of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State Treasury to be dealt with as the Legislature may direct, but said company shall be exempt from taxation by cities and towns."[1]

This charter also empowered the company to lease its railroads and other property, including immunities, for a term of years or in perpetuity (record, p. 8).

The bill set forth, among other things, the constitution of Mississippi of 1869, declaring that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals" (*id.*, p. 2), and the decision and judgment of the Supreme Court of Mississippi in the so-called "Mississippi Mills case" (*Mississippi Mills* v. *Cook*, 56 Miss. 40) rendered in 1878, wherein that court construed the provision of the constitution of 1869 already mentioned, and declared and settled the rule to be that those provisions did not require the legislature to tax the property of corporations for pecuni-

[1] Laws Mississippi, 1882, c. 554, sec. 8, p. 1069.

ary profits, and that the words "subject to" in the constitution did not mean "subjected to," but rather that said "provision is mandatory, not that the property of the corporations shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable to be taxed, if the legislature so wills; . . . The provision is mandatory as to universal liability to be taxed, but permissive to the legislature to tax the property of such corporations, or exempt it, as it may see proper." It was further stated that this adjudication had been followed and reaffirmed by the court in many cases since its rendition, and had become the settled law and rule of property in the state, being adopted and acted upon by the legislative, executive and judicial departments (record, pp. 5, 6).

After alleging a continued course of legislative exemption of many corporations from taxation, the bill proceeded to show that the state railroad commission had never before denied the validity of the exemption of the Canton, Aberdeen and Nashville Company, nor attempted to assess that company for taxation; and moreover, that the constitution of Mississippi, adopted in 1890, expressly provided that "exemptions from taxation to which corporations are legally entitled at the adoption of this constitution shall remain in full force and effect for the time of such exemptions *as expressed in their respective charters*, or by the general laws, unless sooner repealed by the legislature" (Constitution 1890, sec. 181); and that successive legislatures had, since the adoption of that constitution, refused to repeal exemptions contained in charters theretofore granted (*id.*, pp. 6, 7). It alleged that the complainant, "relying in good faith on the constitution and law as settled in the Mississippi Mills case aforesaid, and the practical construction of said constitution of 1869, as aforesaid,

by all the departments and officers of the said State," agreed to advance large sums of money toward building railroads in the state, if a charter exempting them from taxation for not less than twenty years were granted (record, p. 7).

The bill then alleged that, upon the faith of the foregoing interpretation of the constitution of Mississippi, the complainant "advanced the money to build and equip said Canton, Aberdeen and Nashville railroad, . . . to wit, the sum of two million five hundred and thirty-six thousand nine hundred and twenty-four dollars and thirteen cents ($2,536,924.13), and that the same was built with the money so furnished," and that a lease of the railroad so built, running to June 1, 1952, was, on March 31, 1888, executed to the complainant as authorized by the laws of the state; and that the complainant has since been and now is in possession of the property thereunder. The lease covered the railroad, franchises, immunities, etc., including the exemption from taxation. It was alleged that any assessment of the taxes would result in loss to the complainant, and that the levying of the taxes would create a paramount lien upon the property superior to the complainant's rights and "violating . . . the obligations of said charter contract, and said lease" (*id.*, pp. 8, 9).

The bill expressly alleged that the charter and exemption, the right to lease, and the lease itself were contracts rightfully made "in view of the settled law as declared," and valid under the constitution and laws of Mississippi as previously expounded, and that the obligation of these contracts was binding as against any subsequent change of judicial decision (*id.*, p. 9). It also denied the constitutional power of a subsequent legislature to compel the payment of taxes retroactively, while not denying the power of the legislature to

repeal the exemption in the charter as to future taxes (record, pp. 9, 10). Many other charters containing similar exemptions were alleged to have been granted by the legislatures of 1882, 1884 and 1888, and a uniform public policy of inviting the investment of capital in railroad building by offering an exemption from taxation was shown (*id.*, pp. 13, 14). It was alleged that the railroad in question had cost $2,536,924.13, up to June 30, 1897, that the result of its operation between the years 1889 and 1897 showed an average yearly deficit of $129,892.89, (*id.*, pp. 14, 15, 16); that no interest had been paid upon the mortgage bonds since January 1, 1889, and that no dividends had ever been paid (*id.*, p. 16).

The bill then proceeded to show the execution of a mortgage on December 1, 1884, by the Canton, Aberdeen and Nashville Railroad Company upon its railroad and franchises, including the exemption, to secure $2,000,000 of bonds which were sold to the complainant, and a subsequent mortgage securing $1,750,000 of bonds which were exchanged for a like amount of the former bonds, a note for the balance of $250,000 being secured by a subordinate mortgage. The latter bonds and the note were paid for at par, in good faith, and "as secured by a paramount lien, and in reliance upon the said sections of said charter as valid, and upon said mortgaged premises as being free from taxation for twenty years" (*id.*, pp. 17, 18).

Reference was then made to the long series of decisions of the Supreme Court of Mississippi in which the *Mississippi Mills* case had been followed[1] (*id.*, p. 19); and these decisions were alleged to have been overturned and overruled

[1] *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50; *McCulloch et al.* v. *Stone*, 64 Miss. 378, 394; *V. & M. V. R. R. Co.* v. *Thomas et al.* 65 Miss. 553, 562; *Vicksburg Bank* v. *Worrell*, 67 Miss. 47, 58; *Attala County* v. *Kelly*, 68 Miss. 44; *L. N. O. & T. Ry. Co.* v. *Taylor*, 68 Miss. 361; *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787.

by the decision in *Adams* v. *Yazoo and Mississippi Valley Railroad Co.*, rendered June 20, 1898 (now under consideration in No. 244 on this docket). At that time the exemption had continued sixteen years, and it now has less than two years to run. It was alleged that the state revenue agent and the railroad commission had taken steps to levy taxes against the complainant and the Canton, Aberdeen and Nashville Railroad Company for all the years since 1886; that these taxes would be certified to the various collectors who would seize the property of the complainant and parts of the railroad; that the taxes were claimed to be a lien paramount to the mortgages and the lease, and that the alleged lien of the taxes was a cloud upon the title of the complainant as lessee and as creditor (record, pp. 20, 21).

The bill specifically alleged that the acts of the defendants in creating and attempting to enforce the alleged lien for taxes were in violation of the obligation of the charter, of section 10 of Article I. of the Federal Constitution, and of the Fourteenth Amendment (*id.*, p. 21); that the subsequent general revenue laws under which the revenue agent was acting were in violation of section 10 of Article I.; and that the lien resulting from the assessment of the taxes would deprive the complainant, and also the Canton, Aberdeen and Nashville Railroad Company, and its stockholders and creditors, of property without due process of law (*id.*, p. 22). The complainant showed that it advanced the money to build the railroad, took a lease thereof for which the exemption was a material consideration, and received the bonds, in view of the provisions of the constitution of 1869 and the interpretation thereof in the *Mississippi Mills* case in 1878, and averred that its rights

could not be impaired by subsequent change in such interpretation, stating that the *Mississippi Mills* case and other cases following it had created a rule of property which could not be overturned so as to impair the complainant's rights under contracts which were valid when made (record, p. 23).

It was further alleged that many suits had been begun by counties and towns for their shares of the back taxes claimed against other companies; that a like multiplicity of suits would be instituted against the complainant for such taxes; that the county and town collectors had statutory authority to make seizures of property in order to effect summary collection; that payment under protest would only result in a multiplicity of suits to recover back the payments made; and that any remedy at law would be of doubtful utility as to the counties and towns and ineffectual as against the state (*id.*, pp. 23, 24).

The prayer of the bill was, in substance, for a decree enjoining the approval and certification of the assessment of taxes, the beginning of a multiplicity of suits for the recovery of such taxes, the taking of "any proceedings looking to the subjection of the property of your orator, or of the railroad known as the Canton, Aberdeen and Nashville railroad, to the payment of the taxes so claimed, as aforesaid, for the years 1886 to 1897, both inclusive," declaring the property of the complainant and the Canton, Aberdeen and Nashville railroad to be exempt from state and county taxation for such years, and that the charter contract of exemption be declared valid and binding; that such assessment be decreed to be null and void, and the cloud thereof removed; and for further relief (*id.*, pp. 26, 27).

Briefly summarized, the bill thus showed: a contract of exemption, to which the complainant was entitled as assignee by virtue of the lease; a settled construction of the state constitution as permitting such exemptions; the expenditure of large sums by the complainant on the strength of such construction; subsequent state tax legislation the effect of which is to impair the contract relied upon by the complainant; and sufficient grounds for the interposition of a court of equity.

The bill was filed August 5, 1898, and on the same day a writ of injunction was issued in accordance with the prayer of the bill in that behalf (record, pp. 30, 31), which was treated as a restraining order (appellee's brief on motion to dismiss, etc., p. 10). The defendants moved to discharge and quash the injunction upon seven grounds, including the following (record, p. 32):

> "1st. . . . an injunction against them," (the defendants) "or any of them is a suit against the State of Mississippi and prohibited by the 11th amendment to the Constitution of the United States.
>
> . . . . . .
>
> "3d. The court has no jurisdiction."

The plaintiff also moved for a temporary injunction until final hearing. Documentary evidence, including the records in *Mississippi Mills* v. *Cook*, and in *Railroad Co.* v. *Lambert*, and a copy of the decision of the Supreme Court of Mississippi in *Adams* v. *Yazoo and Mississippi Valley Railroad Company* (No. 244 on this docket), was received upon the hearing of the motions, and on February 8, 1899, the court made an interlocutory order (*id.*, p. 38), discharging the restraining order and denying the motion for an injunction. This order recited that "the court . . . finds that the complainant has shown no right to invoke the jurisdiction of this court;

and further being of opinion that this court has not jurisdiction it is therefore considered," etc., etc.

From this order the complainant prayed an appeal to the Circuit Court of Appeals for the Fifth Circuit (record, p. 39), the appeal was allowed (*id.*, p. 40), and, after hearing in that court, was dismissed for want of jurisdiction, on the ground that the federal questions appearing upon the bill of complaint were controlling in the case, and that the case therefore came within subdivision six of section five of the act of March 3, 1891, and an appeal could only be taken direct to the Supreme Court. The Circuit Court of Appeals said:

> "By the averments of the bills, nothing is left to inference as to the complainants' claims raising other constitutional questions. The gravamen of each case is that the complainant is being deprived of contract rights secured by the constitution of the United States. The claim in each case is that the complainant is entitled by contract to be exempted from paying certain taxes, and that, pursuant to statutes of the state of Mississippi passed subsequent to the charters or contracts in question, the officers of the state are proceeding to assess and collect these taxes,—and that to do this would deprive the complainant of rights secured by the constitution of the United States. * * * *The court that renders final decrees in these cases must, either directly or indirectly, decide these constitutional questions.*" *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

The proceedings of the Circuit Court of Appeals do not appear upon the record certified to this court by the circuit court, but the record shows the motion of the defendants to dismiss the bill, made after the dismissal of the appeal, on the ground that the appeal had been dismissed for want of jurisdiction (*id.*, p. 43). This motion was granted, and a final decree was entered by the circuit court dismissing the bill (*ib.*), from which this appeal was prayed on the ground that the "court refused jurisdiction of this cause and dismissed the bill of the com-

plainant finally for want of jurisdiction" (record, p. 44), the error assigned being that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same" (*ib.*). The appeal was allowed and "granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). The questions of jurisdiction in issue appear from the certificate already mentioned (*supra*, p. 1).

After the appeal to the Circuit Court of Appeals had been dismissed, but before the Circuit Court dismissed the bill of complaint, Adams brought suit in the Chancery Court for Clay County, Mississippi, for the recovery of the same taxes involved in this suit, and recovered judgment therefor. An appeal was taken to the Supreme Court of Mississippi and a full *supersedeas* bond given. This appears from the affidavits of the appellee and of Mr. Edward Mayes on file.

Specification of Errors.

The appellant asserts the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction based on the diverse citizenship of the parties.
2. That the court erred in refusing to assume jurisdiction because of the lack of a federal question.
3. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

I.

THE EFFECT OF THE SUBSEQUENT SUIT AND DECREE IN THE MISSISSIPPI STATE COURT.

The appellee contends that the jurisdiction of this court is ousted by the subsequent rendition of the decree in the state court for the recovery of the taxes in suit in a case brought after the commencement of this suit. This objection to the power of this court to proceed with the con-

sideration of the appeal on the merits appears to be conclusively answered by the decision rendered by this court on March 19 in *Huntington* v. *Laidley*. In that case it appeared that Laidley had, after the commencement of the suit in the United States court, obtained a judgment at law in his favor in a state court, and also a decree dismissing a bill in equity filed against him concerning the same subject matter. Notwithstanding this final judgment and final decree of the state court, this court, after determining that it had jurisdiction of the appeal, refused to consider whether the proceedings in the state court operated as a bar to the further prosecution of the suit in the federal court, Mr. Justice Gray saying:

> "Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense —either by way of *res adjudicata*, or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The Circuit Court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case."

The cause was accordingly remanded in order that the circuit court might for itself determine the due effect of the proceedings in the state court.

But, beyond this, there is the question whether the subsequent decree of the state court, although duly appealed from and covered by a *supersedeas* bond, ousts this court of jurisdiction, notwithstanding that the decree in the state court may be reversed and

declared a nullity, in which event the appellant in this case would have to begin a new suit in the United States Circuit Court to obtain the same relief. This point of the effect of the judgment so appealed from and covered by a *supersedeas* bond is undoubtedly a difficult and close one. It is, however, a question which has never been decided by this court. On the contrary, in a case at the last term where the point was presented, the court found that it was not necessary to consider the authorities which hold that a perfected appeal substantially vacates or suspends the judgment below. *Hubbell* v. *United States*, 171 U. S. 203, 210.

Numerous cases were cited by the appellee on the motion to dismiss as sustaining the proposition that a judgment, although an appeal has been taken accompanied by a *supersedeas*, is yet available in support of a plea of *res adjudicata*. Many of the cases thus cited utterly fail to sustain the proposition; and authorities of great respectability may be referred to where the precise point has been ruled the other way. *Woodbury* v. *Bowman*, 13 Cal. 634; *People* v. *Treadwell*, 66 Cal. 400, and cases cited; *Spears* v. *County of Modoc*, 101 Cal. 303, 304; *Glenn* v. *Bursh*, 3 Colo. 26, 36; *Card* v. *Foot*, 57 Conn. 427, 432; *Sharon* v. *Hill*, 26 Fed. Rep. 337, 345; *Byrne* v. *Prather*, 14 La. Ann. 653; *Day* v. *De Jonge*, 66 Mich. 550; *Ketchum* v. *Thatcher*, 12 Mo. App. 185; *Haynes* v. *Ordway*, 52 N. H. 284; *Hall* v. *Calvert*, 46 S. W. Rep., 1120, 1125; *Railroad* v. *Brigam*, 95 Tenn. 624; *Texas Railway Co.* v. *Texas*, 85 Texas 605; *Cunningham* v. *Holt*, 12 Texas Civ. Ap. 150.

The effect of an appeal in admiralty has always been to suspend the sentence altogether, so that it could not be used as *res adjudicata* until the determination of the appeal. *Yeaton* v. *The United States*, 5 Cranch, 281, 283; *Souter*

v. *Baymore*, 7 Pa. St. 415, 417. See, also, *Draper* v. *Davis*, 102 U. S. 370; *Keyser* v. *Farr*, 105 U. S. 265.

Even where it has been held that a judgment from which an appeal had been taken was still available to support a plea of *res adjudicata*, it has nevertheless been conceded that such a plea could not be so used as to work an injustice, and therefore that in proper cases execution upon a judgment obtained upon such a plea would be stayed to await the event of the appeal. Durfee, C. J., said in *Paine* v. *Schenectady Insurance Co.*, 11 R. I. 411, 416:

> "We will add, however, as matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive effect, whereas in New York, if the appeal is successful, it will be conclusive only for a short time."

See, also, *Scott* v. *Pilkington*, 2 Best & Smith, 11, 41; 1 Tidd's Prac. (3d Am. Ed.) 530 *et seq.*; *Newcomb* v. *Drummond*, 4 Leigh, 58.

At any rate, is it not preferable to leave that question as to the legal effect of the judgment of the state court to be duly raised by plea and duly considered and adjudicated? Let this court decide the fundamental question of jurisdiction; and then let the appellee bring up in orderly and due form the question of law as to the point of *res adjudicata*. If the motion to dismiss should be granted on the ground now discussed, the court will have given the decree of the Chancery Court of Clay County, Mississippi, a "permanently conclusive effect," and will have ousted its own jurisdiction and that of the Circuit Court of the United States to hear and determine the cause.

We are not concerned here with the doctrine of *res adjudicata* as a matter of strict right. The motion in this

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aspect is addressed to the discretion of the court. That discretion should not be so exercised as to impair the jurisdiction unless it is perfectly clear that in no possible event can the appellant prevail upon the hearing on the merits in the court below. *Non constat* but that, by the time we are heard upon the merits of this case in the Circuit Court, the Supreme Court of Mississippi may have reversed the subsequent judgment of the state court, thus setting the alleged estoppel at large, and opening the way to appellant's ultimate success. The validity of appellant's claim to an exemption can then be settled for the future as well as for the past, and the litigation finally determined. *United States* v. *Freight Association*, 166 U. S. 290, 307.

In *Reilly* v. *Bader*, 50 Minn. 199, 203, the court refused to consider the point of *res adjudicata* upon a motion, saying: "Without questioning the correctness of counsel's position in respect to the conclusiveness, generally, of the first final judgment between the same parties and their privies, touching the same subject-matter, it is perfectly obvious that the object sought for by him cannot be attained by means of a motion. Such practice is unheard of."

II.

The jurisdiction of this court.

The appeal to this court was prayed under the first clause of section 5 of the act of March 3, 1891 (record, p. 44). The only error assigned was that "the court erred in dismissing the bill . . for want of jurisdiction to entertain the same" (*ib.*). The allowance of the appeal stated: "This appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction in this cause" (*id.*, p. 45). In accordance with the

practice followed in *Shields* v. *Coleman*, 157 U. S. 168, the Circuit Court reserved to itself the determination of the question as to the portions of the record to be sent up in case counsel should not agree (record, p. 45). The certificate, which was based upon that approved in *Colvin* v. *Jacksonville*, 158 U. S. 456, 458, stated the three questions of jurisdiction involved, recited that the bill was dismissed for want of jurisdiction, and formally certified the three questions already stated (*id.*, pp. 47–49). Even without the certificate, the question of jurisdiction sufficiently appeared. *In re Lehigh Min. & M'f'g. Co. Petitioner*, 156 U. S. 322, 327; *Shields* v. *Coleman*, 157 U. S. 168, 176; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217, 219; *Smith* v. *McKay*, 161 U. S. 355, 357.

If the Circuit Court was right in holding that there was no diversity of citizenship sufficient to sustain the jurisdiction, that only left the case as if no such diversity had ever been claimed. There was another independent and substantial ground of jurisdiction arising from the subject matter of the suit, namely, that the case arose under the Constitution of the United States, and the two remaining questions which have been certified are sufficient to sustain the jurisdiction of this court to entertain the appeal. Both questions go to the jurisdiction of the Circuit Court "as a court of the United States." *Blythe* v. *Hinckley*, 173 U. S. 501, 507. The second ground certified—that "the bill set forth no particular Federal question"—could relate to nothing but the jurisdiction conferred by section one of the act of August 13, 1888. The third ground certified—that the "bill was a suit against the State of Mississippi and in violation of the eleventh amendment"—related as clearly to the jurisdiction of the

court as a federal court. The language of the Eleventh Amendment is expressly directed to the "judicial power", *i. e.*, jurisdiction—power to hear and determine—of the courts of the United States.

> "The *Judicial power of the United States* shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment does not effect a limitation upon the jurisdiction of courts in general, but operates only upon the "judicial power" of the United States, which can be exercised through the medium and jurisdiction of the federal courts alone; and it deals with the question of power *vel non*, and not with the method of the exercise of that power. The question of jurisdiction in this respect is pre-eminently one of federal cognizance. This court very lately said, where the same point was involved: "The principal question before us is whether this suit is one of which a Circuit Court of the United States may take cognizance *consistently with the Constitution of the United States.*" *Fitts* v. *McGhee*, 172 U. S. 516, 524. The question of jurisdiction in this aspect clearly supports the appeal within the recent decision of this court in *Huntington* v. *Laidley* (decided March 19, 1900).

So far as the effect of the appeal to the Circuit Court of Appeals is concerned, it is idle to contend that the appellant had an election, after the making of the order denying the motion for an injunction *pendente lite*, whether to appeal to the Circuit Court of Appeals or to this court. The order was in no sense a final decree. It did not purport to dismiss the bill, but left the suit still pending for further proceedings. It is true that the grounds of the order denying the injunction

may have been such as to indicate that the final decree would go against the complainant; but, until that final decree was made, there was nothing on which to base an appeal to this court, and hence there could be no election. There is no question or danger of two appeals at the same time from the same decree. The Act of March 3, 1891, as amended by the Act of February 18, 1895 (28 Stat. 666), expressly provides for an appeal from such an interlocutory order as was made in this cause; and nothing in the act indicates that it was intended to cut off an appeal from a final decree when rendered. That result could only occur if the Circuit Court of Appeals should exercise any authority conferred upon it by the Act of 1895 to determine the whole case finally on an appeal from an order discharging a temporary injunction. In any event, the Circuit Court of Appeals had no jurisdiction of the only appeal taken to it; and that can hardly be said to have been an election which resulted in no hearing or adjudication upon the merits.

The entry of the final decree brought the appellant's case precisely within the first conclusion tabulated by the Chief Justice in *United States* v. *Jahn*, 155 U. S. 109, 114, as follows: "(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court." The case is not included in any one of the other four divisions into which the subject is divided in that opinion.

But the main point is that, whatever revisory power the Circuit Court of Appeals might have exercised, and whatever form of decree it might have entered, its appellate jurisdiction was not exercised in fact, and its decision

upon the question of its own jurisdiction left the cause precisely where it was when the appeal from the interlocutory order was taken. That court said:

> "We express no opinion on the question of the jurisdiction of the circuit court, further than to say that the constitutional questions on which we base our conclusion as to the appellate jurisdiction of this court were necessarily considered in reaching a decision on the question of the jurisdiction of the circuit court. This much seems pertinent, if not necessary, in view of the fact that the interlocutory orders of the circuit court recite that, in its opinion, it was without jurisdiction of the cases. The appeals are dismissed." *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856.

It is difficult to see how the Circuit Court of Appeals could have certified any question to this court excepting that of its own jurisdiction. *Green* v. *Mills*, 25 U. S. App. 383, 392, read in connection with *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181, rules that, where the federal question is not controlling, the Circuit Court of Appeals may take jurisdiction and decide the case on non-federal points. There is a radical distinction between such a case and the case at bar. Here the federal question was treated as controlling by the Circuit Court of Appeals (p. 10, *supra*). Although the Circuit Court of Appeals might have considered the entire case on the merits and rendered a final decree if it had retained jurisdiction, it did not do so, and there has been no final adjudication or decree except that rendered by the Circuit Court. Under no possible construction of acts conferring jurisdiction could this court have entertained an appeal from the interlocutory order vacating the injunction. *Kirwan* v. *Murphy*, 170 U. S. 205, 210.

The Circuit Court refused to continue the restraining order because it had no jurisdiction. The Circuit Court of Appeals declined to review this order because it in turn

had no jurisdiction, the case being one in which an appeal from the final decree should be taken exclusively to this court. In view of these two facts, there having been no decision by any court upon the merits, it is not candid to say, as was done in the motion to dismiss in this court, that the proceedings below have "left adjudged . . . every question within the appellate jurisdiction of the Court of Appeals presented by the record." Nothing has been adjudged except the lack of jurisdiction of each court. It is indeed doubtful whether a writ of *certiorari* would have been issued by this court to review the order dismissing the appeal. *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587. We do not now attack the adjudication of the Circuit Court of Appeals. On the contrary, we attempt to follow its ruling that this cause involves the application of the Federal Constitution and the validity of state laws claimed to be in contravention of the Constitution of the United States. It follows that the case is one arising under that instrument, and by reason of its subject matter is within the jurisdiction of the Circuit Court.

III.

Jurisdiction and power of the Circuit Court.

The bill of complaint presented a case clearly within the jurisdiction of the Circuit Court. The contract embodied in the charter of the Canton, Aberdeen and Nashville Railroad Company and the subsequent contract of lease between that company and the complainant were set forth, and it was specifically charged that the subsequent legislation of the state had impaired these contracts and the rights resulting therefrom (record, p. 22). This was all that was necessary to sustain the jurisdiction as

of a case arising under the Constitution of the United States.

In the recent case of *City Railway Co.* v. *Citizens' Railroad Co.* 166 U. S. 557, Mr. Justice BROWN had occasion to lay down the rule as follows (p. 562):

> "There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that *jurisdiction depended upon the allegations of the bill*, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.
>
> "ALL THAT IS NECESSARY TO ESTABLISH THE JURISDICTION OF THE COURT IS TO SHOW THAT THE COMPLAINANT HAD, OR CLAIMED IN GOOD FAITH TO HAVE, A CONTRACT WITH THE CITY, WHICH THE LATTER HAD ATTEMPTED TO IMPAIR. . . .
>
> "Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans* v. *New Orleans Water Co.*, 142 U. S. 79, 88."

The jurisdiction of the federal courts has been invoked in many similar cases: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co.* v. *Rivers*, 115 U. S. 674; *Tammany Water W'rks v. N. O. Water W'rks*, 120 U. S. 64; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1.

In *Smyth* v. *Ames*, 169 U. S. 466, 518, Mr. Justice Harlan said:

> "These are cases of which, so far as the plaintiffs are con-

> cerned, the Circuit Court has jurisdiction * * upon the further ground that, as the statute of Nebraska under which the State Board of Transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, *the cases may be regarded as arising under that instrument.*"

The case being thus within the jurisdiction of the federal courts by reason of its subject matter, those courts will apply the same rules of decision as if jurisdiction were based upon diverse citizenship. Nothing is better settled than that the federal circuit courts, in the exercise of their original jurisdiction, and this court, upon appeal from their decisions, are not bound by state decisions in cases where rights have been acquired in reliance upon the law as expounded at the time by the state tribunals. No subsequent change of judicial opinion has been permitted to impair those rights. This has never been a subject of doubt in this court since the decision in *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 206, where Mr. Justice Swayne said:

> " 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts altering the construction of the law.* The Ohio Life & Trust Co. v. Debolt, 16 Howard, 432.'
>
> " The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." [1]

[1] The following cases illustrate the doctrine: *Meyer* v. *The City of Muscatine*, 1 Wall. 384, 393; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303; *Mitchell* v. *Burlington*, 4 Wall. 270, 274; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *The City* v. *Lamson*, 9 Wall. 477, 485; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Supervisors* v. *United States*, 18 Wall.

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Jurisdiction is not, of course, claimed because of a judicial impairment of the complainant's contract rights. No such idea is entertained. But jurisdiction is claimed because a legislative impairment of those rights makes a case arising under the Constitution of the United States and within the original jurisdiction of the Circuit Courts of the United States. In administering that jurisdiction the federal courts will protect the complainant against any impairment of the rights which it has acquired in reliance upon the laws of the state as declared, although in so doing they may run counter to a subsequent change in judicial opinion. *Pease* v. *Peck*, 18 How. 595, 599; *Havemeyer* v. *Iowa County*, 3 Wall. 294, 303; *Lee County* v. *Rogers*, 7 Wall. 181, 183; *Chicago* v. *Sheldon*, 9 Wall. 50, 55; *Olcott* v. *The Supervisors*, 16 Wall. 678, 690; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 677; *Douglass* v. *County of Pike*, 101 U. S. 677, 687; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294.

The true and sound distinction between cases originating in the federal courts and those coming to this court on writ of error to a state court has been most clearly illustrated in the cases of *Central Land Company* v. *Laidley*, 159 U. S. 103, 111, and *Bacon* v. *Texas*, 163 U. S. 207, 221.

71, 82; *Boyce* v. *Tabb*, 18 Wall. 546, 548; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 678; *Township of Elmwood* v. *Marcy*, 92 U. S. 289, 294; *Ober* v. *Gallagher*, 93 U. S. 199, 207; *Commissioners, etc.*, v. *Thayer*, 94 U. S. 631, 642; *Douglass* v. *County of Pike*, 101 U. S. 677, 686; *Thompson* v. *Perrine*, 103 U. S. 806, 816; *Taylor* v. *Ypsilanti*, 105 U. S. 60, 72; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *County of Ralls* v. *Douglass*, 105 U. S. 728, 731; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Green County* v. *Conness*, 109 U. S. 104, 105; *Carroll County* v. *Smith*, 111 U. S. 556, 562; *Anderson* v. *Santa Anna*, 116 U. S 356, 361; *Bolles* v. *Brimfield*, 120 U. S. 759, 763; *German Bank* v. *Franklin County*, 128 U. S. 526, 538; *Clark* v. *Bever*, 139 U. S. 96, 117; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 99; *Folsom* v. *Ninety Six*, 159 U. S. 611, 627; *Wade* v. *Travis County*, 174 U. S. 499, 507.

IV.

The suit is not one against a state.

The true ground of decision upon this point has been lately pronounced by this court in *Fitts* v. *McGhee*, 172 U. S. 516, where Mr. Justice Harlan, after observing (p. 525) that "what is and what is not a suit against a State has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question," proceeded to distinguish a suit against officers of a state, as such, to restrain them from enforcing laws of the state which imposed no special duty upon them, from a suit to restrain state officers "specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights" (p. 529.) The opinion continues as follows (*ib.*):

> "There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

Herein lies a wide distinction between *Fitts* v. *McGhee* and similar cases, and the case at bar, where the statutes which are alleged to impair the obligation of the contract not only "specially charge" upon the state revenue agent the duty of enforcing their provisions, but even create the very office itself and give him a personal interest of twenty

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per cent. in all recoveries. As to the appellant, these statutes are void, and so they can confer no valid power or authority upon the incumbent of the office in respect of the appellant's property. His action, to this extent, being based upon an unconstitutional and void statute, is itself lawless, and there is ample jurisdiction to restrain him from proceedings which will cause the appellant irreparable injury by involving it in a multiplicity of suits and casting cloud upon its title. The case is within the rule laid down by this court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 388; *Scott* v. *Donald*, 165 U. S. 58, 67; and *Smyth* v. *Ames*, 169 U. S. 466, 518. The railroad commission is also specially charged, and for the first time, by the Code of 1892, with the duty of assessment, certification and revision by the same statutes which, as to the appellant, are powerless to confer any constitutional authority.[1]

It is also to be observed that, under section 3880 of the Mississippi Annotated Code of 1892, the assessment rolls were required to be so made "that each county, levee district, and municipality shall receive its just share of such taxes proportionately to the amount of property therein situated," and under the Act of February 7, 1894, creating the office of state revenue agent, that official has a "right of action" where the "state, or any county, municipality or levee board has the right of action or may sue" (Laws Mississippi, 1894, p. 29). The state was therefore not the only party in interest in collecting these

[1] In the *Virginia Coupon Cases*, 114 U. S. 270, 288, the defendant sought to substitute the State in his place under cover of unconstitutional state legislation. This court brushed the attempt aside, thus referring to the unconstitutional law:

"That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done."

taxes, its interest being comparatively small, and the counties and municipalities have the substantial interest in the subject matter. There is no constitutional inhibition preventing such suits against municipal corporations or their representatives. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

It is therefore submitted that this court has jurisdiction to entertain the appeal, and that the decree of the Circuit Court should be reversed and the cause remanded to that court for further proceedings.

Washington, October Term, 1899.

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Nos. 318, 319 & 320.

Office Supreme Court U.S.
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JAMES H. McKENNEY, Clerk.

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MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et al.*
No. 318.

Filed April 16, 1900.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et al.*
No. 319.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et al.*
No. 320.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MEMORANDUM FOR APPELLANTS AS TO AMOUNTS IN CONTROVERSY.

WILLIAM D. GUTHRIE,
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WASHINGTON, April 16, 1900.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *vs.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 318.
ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *vs.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 319.
YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*, *vs.* WIRT ADAMS, State Revenue Agent, *et al.*	No. 320.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MEMORANDUM FOR APPELLANTS AS TO AMOUNTS IN CONTROVERSY AS AFFECTING JURISDICTION OF THE CIRCUIT COURT.

The brief filed in these three cases on behalf of certain appellees urges that the amount in controversy in each of these suits is not sufficient to sustain the jurisdiction of the circuit court. No such point was made in the court below, nor does any such question of jurisdiction appear upon the certificates in the records. But aside from this,

and upon the merits of the claim, it is seen to be altogether fictitious by a mere inspection of the record in each case.

In No. 318 the state revenue agent and the state railroad commission were made defendants, and the bill of complaint alleged that the railroad commission was about to make an assessment for taxes and that the revenue agent was about to proceed to collect such taxes, amounting to "a large sum, much more than twenty thousand dollars ($20,000)," and to enforce the lien therefor by sale of the complainant's property (record, pp. 20, 21); and the prayer was for a decree restraining the railroad commission from approving or certifying the assessment, and restraining the revenue agent from bringing suit for such taxes, and also that the contract of exemption be declared to be valid and binding, and that the assessment for such taxes be decreed to be void (*id.*, pp. 26, 27).

In No. 319 the revenue agent and the railroad commission were also made defendants, and the bill alleged that the proceedings of the railroad commission sought to be enjoined covered taxes for the years 1886 to 1891, inclusive, the assessment amounting to more than $50,000 (record, p. 22); that the taxes upon such assessment amounted to about the sum of $60,000 (*id.*, p. 29), and that the cloud cast upon the title by the assessment therefor would cause injury to the amount of $60,000 or $70,000 (*id.*, p. 32); and the prayer was for an injunction against the certification of such assessment, and against any suit or proceedings by the revenue agent for the recovery of judgment for said taxes, and also for a decree that the contract in the charter of the Natchez and Jackson Railroad Company be declared valid and binding, and that the assessment be decreed to be void (*id.*, pp. 33, 34).

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In No. 320 the state revenue agent and the sheriffs of the counties through which the complainant's road runs were made defendants, and the bill alleged that the amount of taxes in dispute exceeded $100,000, and exceeded the sum of $2,000 in each of the counties (record, p. 10). The prayer of the bill was for an injunction against any suit for the recovery of the taxes and also for a decree that the complainant's liability for such taxes had been fully discharged, and removing the cloud from its title (*id.*, p. 13).

It will thus be seen that the object of each suit was to prevent the state revenue agent, the principal defendant, from bringing suit upon the assessment made or to be made by the railroad commission and also to prevent the cloud upon title which would be caused by the approval and certification of that assessment to the local collectors in the counties. That this was the true purpose is demonstrated by the fact that the revenue agent brought such suits the moment he deemed himself freed from the injunction orders originally granted by the circuit court (see affidavits of appellee on motions to dismiss appeals). The assessments of the railroad commission in each case many times exceeded the jurisdictional amount, and, as between the complainant in each case and the revenue agent and the railroad commission, constituted the matter in dispute. The case is clearly distinguishable from those cases where a distinct and separable assessment not amounting to $2,000 has been made in each of several counties, and it has been attempted to join the local collectors in one suit so as to make out the jurisdictional limit by uniting the amounts of the various assessments. In such cases this court has held that, inasmuch as a payment under protest

in each county would only result in a cause of action for less than the jurisdictional amount in each case, the assessments in different counties cannot be united so as to confer jurisdiction. Here, under the act of 1894, the state revenue agent was expressly empowered "to proceed by suit . . . for all past due and unpaid taxes . . . where the State or any county, municipality or levee board has the right of action or may sue."[1] He also has express power "to sue for, collect and have assessed as herein required, delinquent taxes" for past years back to 1886.[2] Proceeding under this authority, the revenue agent, as shown by the records in Nos. 244 and 324, in the former case united in one declaration and one suit as one cause of action, the taxes for all the counties through which the Louisville, New Orleans and Texas Railway runs, in one instance joining the taxes for the years 1893 and 1894, and in the latter suit has united not only the taxes for all the towns and cities,

[1] SEC. 2. The State Revenue Agent may appoint a sufficient number of deputies. He shall have power and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures for all past due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State Revenue Agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the Revenue Agent to sue shall arise only after he has given thirty days' notice to the delinquent officer to pay over the amounts and he fails to do so (Laws of Mississippi of 1894, c. 34, p. 29).

[2] SEC. 6. The Revenue Agent shall have power to sue for, collect and have assessed as herein required, delinquent taxes or taxes that have escaped the assessor and collector back to and including the year 1886, and no further (Laws of Mississippi of 1894, c. 34, p. 29).

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but all of such taxes for many different years. It is such a proceeding that is sought to be enjoined, and in this view there should be no question or doubt that the matter in dispute in each of the suits far exceeds the sum of two thousand dollars.

Under the Code of Mississippi of 1892, the members of the state railroad commission act as railroad appraisers and assess railroad property.[1] This assessment, after opportunity for objection and after approval, is sent to the various counties for collection.[2] It is the assessment as a whole and the collection thereof by the revenue agent under the laws here quoted that are sought to be restrained in these suits.

Tested by the rules referred to in *Walter* v. *Northeastern Railroad Co.*, 147 U. S. 370, 372, it is evident that the amount in controversy in these suits is sufficient to support the jurisdiction of the circuit court. In the event of decrees upon the merits in favor of the complainants, the revenue agent would be restrained in each case from suing upon the whole claim for taxes, which far exceeds the jurisdictional amount, and from taking other proceedings for their collection or enforcement; and there would also

[1] 3877. *Assessment and taxation of railroads; state railroad assessors.*—The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property liable to taxation in the state, affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state.

[2] 3882. *The same; assessments sent to the counties.*—So soon as the assessment-rolls have remained subject to objection for one month, and when all objections, if any, are disposed of, the assessment-rolls shall be approved either by order of the railroad commission or by operation of law, and the same shall be sent to the clerks of the boards of supervisors of the respective counties, who shall file and preserve the same as a record.

be decrees that there was no liability for the taxes and removing the cloud on the title arising from the assessment. In Nos. 318 and 319, there would also be decrees declaring the validity of the contracts contained in the charters involved in those cases. Such decrees would undoubtedly be entire as against the revenue agent and the railroad commission, and it would be impossible to say that as to any defendant in Nos. 318 and 319 any distinct or separable relief was granted which involved a matter of less than two thousand dollars. In No. 320, where the sheriffs of the counties are joined as defendants, the relief granted as to the revenue agent would involve the whole matter in dispute between the parties and would sustain the jurisdiction. As to the revenue agent, the decree in each case will be several and distinct; and as to the railroad commission, the decree will also be several and distinct, involving an assessment which at the bringing of the suit had not been yet parceled out between the different counties, and the separation, certification and approval of which it is the main object of the suit to prevent. Even in No. 320, there was at the bringing of the suit no separate enforceable claim on the part of the different sheriffs against the railroad company, and, therefore, there was no separate or distinct liability to injunction on the part of these same officials. If the joinder of these collectors might have the effect to make the liability distinct as to them, yet as to the revenue agent the liability would still be entire and sufficient to sustain the jurisdiction, and the bill may be retained for relief against him.

Applying the test mentioned in *Walter* v. *Northeastern Railroad Co.*, *supra*, if the amount of the taxes included in the assessment by the railroad commission

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had been paid to the revenue agent under protest, the complainants would not, and probably could not, have brought separate actions for its recovery. The right of action in such a case, arising upon a distinct and indivisible transaction, would result in only one suit, and that suit would be based upon the whole amount of the payment thus made.

The cases are entirely different from *Fishback* v. *Western Union Telegraph Co.*, 161 U. S., 96, 98, 101, where, after the actual making of the assessment and its certification to the several county officers, and its listing by them, it was claimed that the joinder of the state railroad commission conferred jurisdiction to restrain the enforcement of the assessment as a whole. Such an attempt resembled rather a proceeding by way of *certiorari* to review an assessment than a suit in equity for an injunction or other relief. Here, the very purpose of the suits is to restrain what had already been accomplished in the *Fishback* case, namely, the splitting up of the assessment and its certification to the different counties, and the consequent cloud upon the title caused thereby. This distinction was pointed out and approved by Barr, J., in *Western Union Tel. Co.* v. *Norman*, 77 Fed. Rep. 13, 20, where it was said, referring to the *Fishback* and the *Walter* cases:

> "In both of these cases it was sought to enjoin the collection of local taxes which had been assessed and levied by the respective counties and municipalities. Hence the local taxes had been distinctly separated, so that a separate action could have been maintained against the counties and municipalities, if the taxes had been paid under protest. Here it is sought to prevent the auditor from completing the appraisement and levy of taxes, which, if completed without legal authority, would be a wrongful act, and one probably subjecting him to an action by the party injured thereby."

The same conclusion was reached in *Western Union Tel. Co.* v. *Poe*, 61 Fed. Rep. 449, where an injunction was sought to restrain the state board of appraisers from making an assessment, which, when distributed, would not amount to two thousand dollars in any one county. Taft, J., said (pp. 453, 454):

> "What is here sought to be enjoined is the certificate by the board of appraisers to the county auditors of the amounts to be assessed against plaintiff. The auditors are then, by law, required to place the same upon the tax duplicate, and deliver the duplicates to the county treasurers as warrants for the collection of the taxes. The duties of the county auditors and treasurers in this matter are wholly ministerial. The law reposes in them, no discretion whatever, to reduce or modify the assessment. . . .
>
> "Again, it is urged that the affidavits filed show conclusively that in no single county will the assessment against the complainant amount to $2,000; wherefore the argument is that the jurisdiction of this court cannot be supported by adding together the amounts due in each county. If my conclusion is correct, that this action will lie against the board of appraisers, *there is nothing whatever in this objection, because the amount involved in controversy in the suit is the whole amount to be certified by the board under the law, less the aggregate amount which the complainant must pay in the various counties of Ohio, under such laws as are in force if the Nicholls law is not valid.* That difference admittedly exceeds $2,000. For this reason, I am of the opinion that the bill does present a case for equitable relief in a federal court."

The same result was also reached in the similar case of *Adams Express Co.* v. *Poe*, 61 Fed Rep. 470, 472; and this case ultimately came to this court and was heard and decided on the merits of the federal question involved (*Adams Express Company* v. *Ohio*, 165 U. S. 194, 199, 219).

The proceedings of the revenue agent and of the railroad commission which it is sought to restrain therefore involve a sum many times the amount limiting jurisdic-

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tion in the circuit court; and the bills, which seek to prevent or remove the cloud upon title caused by the assessments, and to obtain decrees declaring the validity of the contracts, call for decrees upon matters far in excess of the statutory limit.

Washington, April 16, 1900.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellants.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

No. 319 Sep. 78
Ill. C. R. R. Co. vs. Guthrie, Fentress & Mayes
Mississippi Tax Cases.
For Appt. (mo.
CHAS. SUMNER
FEB 1, 1900
10083
MAR 24 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.
Filed Mar. 24, 1900.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

MEMORANDUM FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

For the fifth time in this litigation, and within a period of less than one year, this court is asked to summarily dismiss another of these cases or to affirm the decree below without a hearing in court. The other four motions for the same relief, made in Nos. 244, 318, 320 and 324, were all postponed to the hearing of those cases upon the merits. No. 244 is now expected to be reached for argument during the week beginning April 9, 1900, and the above-entitled case and Nos. 318, 320 and 324 have, upon the motion of the appellants and plaintiffs in error, been advanced for hearing after No. 244. Under these circumstances, it is submitted that there is no necessity for haste or for an examination of the questions involved in the appeal without oral argument only two weeks in ad-

vance of the time when, as now set down, the appeal will be regularly argued.

The questions presented as to the jurisdiction of this court and as to the merits do not differ in substance from those involved in Nos. 318 and 320, and have twice been fully submitted to the court. The jurisdiction of this court is clear, the certificate of the judge who held the Circuit Court being conclusive upon this point (record, pp. 136, 140). Nor upon the merits does there seem to be any real doubt of the jurisdiction of the Circuit Court, which was based not only upon diverse citizenship (*id.* p. 1), but also upon the fact that the suit arose under the Constitution of the United States, inasmuch as the state legislation under which the defendants acted was claimed to impair contract rights in violation of section 10 of Article I. of the Constitution, and such action was also claimed to amount to a deprivation of property without due process of law and to a denial of the equal protection of the laws, in violation of the Fourteenth Amendment (*id.* pp. 20, 21, 24, 30, 32). The Circuit Court of Appeals in this case held in effect that the Circuit Court had jurisdiction (*Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep. 852, 856).

As to the effect of the subsequent suit and judgment in the state court as a bar to the further prosecution of this appeal, it is only necessary to say that such an application of the rule of *res adjudicata* would permit the state court, by hastening its judgment, to nullify the jurisdiction and power of this court upon an appeal regularly taken to it and now pending here, and deny to litigants the benefit and protection of the federal courts in a case properly within the scope of federal jurisdiction.

It can hardly lie with the appellees to suggest that the

questions presented are "frivolous," for an argument of 109 printed pages is submitted in support of the motions, and it has been found necessary to cite over two hundred authorities. We cannot think that the court will dismiss or affirm without oral argument in any case where so extended and elaborate a discussion is required, and where there can be no well-founded claim that the appeal was taken for delay.

These motions should therefore be postponed to the hearing upon the merits, which should take place within the next two or three weeks.

Washington, March 26, 1900.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for the Appellant.

Office Supreme Court U.S.
FILED
APR 4 1900
JAMES H. McKENNEY,
Clerk.

No. 319. 78

Br. of Guthrie, Mayes, Fentress & Dickinson for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 319

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 133), which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the Act of March 3, 1891 (*id.*, pp. 133–135), and the judge holding the circuit court certified as follows:

> "The question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:
>
> "1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through the Yazoo & Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Yazoo & Mississippi Valley Railroad Company a party defendant in the cause.
>
> "2. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"3. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (record, p. 140).

Notice was given of motions to dismiss or affirm, returnable March 26, 1900, but these motions were postponed to the hearing on the merits. The jurisdiction of the Circuit Court is claimed on the ground that the suit is one of "a civil nature . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and arising under the Constitution or laws of the United States.*"[1] Jurisdiction is also claimed by reason of diverse citizenship (*id.*, pp. 1, 2).

So far as the present appeal is concerned, the case presents in substance the same questions of jurisdiction here and below as are involved in Nos. 318 and 320, the contract claimed to be impaired being of the same tenor as that involved in No. 320, providing for the appropriation of taxes to the payment of construction debt, and not, as in No. 318, for an exemption from taxation. Counsel for the appellant desire to make a statement of the facts necessary to the consideration of the appeal, showing the jurisdiction both of this court and of the circuit court, and to specify the errors complained of, and pray leave to refer to their brief filed in No. 318 for a discussion of the questions of law arising upon the record, which are conceived to be the same in this case as in Nos. 318 and 320.

Statement of the case.

The bill of complaint was filed by the Illinois Central Railroad Company, a corporation of the State of Illinois,

[1] Act of August 13, 1888, 25 Stat. 434.

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against Wirt Adams, state revenue agent, and the members and clerk of the Railroad Commission of Mississippi, all citizens of Mississippi, and the Yazoo and Mississippi Valley Railroad Company, a corporation of that state (record, pp. 1, 2), for the purpose of restraining the enforcement of taxes for the years 1886 to 1891 inclusive, alleged to be imposed in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment (*id.*, p. 21).

The bill of complaint alleged the incorporation of the Natchez, Jackson and Columbus Railroad Company in 1870 and set forth as part of its charter the contract relied on (*id.*, pp. 5, 6):

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State, and municipal, to which said company shall be subject: Provided, however, that whenever the profits of said company shall enable

it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

After quoting the provision of the Constitution of Mississippi of 1869 that the property of corporations should be "subject to taxation," the bill set forth the decision of the Supreme Court of Mississippi, in *Mississippi Mills* v. *Cook*, 56 Miss. 40, 50, to the effect "that the words of section 13, article XII of said constitution aforesaid, did not require any legislature to tax the property of corporations for pecuniary profits, and that the words 'shall be subject to,' did not mean subjected to; or, in other words, that said provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but such property shall ever be subject to, *i. e.*, liable—to be taxed, if the legislature so will" (record, p. 8). It was alleged that this adjudication had been followed in many cases since its decision in April, 1878, and had for twenty years been the settled law and rule of property of the state, and had been adopted and acted upon by the legislative, executive and judicial departments (*id.*, pp. 5, 8).

The bill then alleged the construction of the railroad, which was not begun for several years, and the main portion of which was built after the decision in *Mississippi Mills* v. *Cook;* the issue of its capital stock to the amount of $2,028,000, and of its bonds to the amount of $1,250,000. It was also alleged that the railroad was constructed and its liability on bonds and floating debt incurred on the faith of and relying on the contract above quoted and the

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judicial decision affirming its validity (record, pp. 10, 11).

The bill then alleged the creation of the Louisville, New Orleans and Texas Railway Company by consolidation, the building of its road in the years 1882–1884, and the passage in 1890 of an act authorizing the Natchez Company to sell its railroad and "all franchises, rights, powers, privileges and immunities" to the L., N. O. & T. Company (*id.*, p. 13).

It was alleged that, at the time of the passage of the act authorizing the sale, the Natchez Company had for many years been in the actual enjoyment, "openly and notoriously," of the privileges conferred by said contract and that such privilege, also contained in the charter of the L., N. O. & T. Company, had been expressly decided by the state Supreme Court to attach to such property of the railway company as was "necessary to the construction, equipment, maintenance and operation of its road" (*id.*, pp. 13, 14). The bill then stated that in reliance upon the contract, as made part of the charter of the Natchez Company, and upon the decisions of the state Supreme Court, upon the fact of the enjoyment of the privilege under section 21 by the Natchez Company for twelve years, and upon the repeated refusal of the legislature to repeal said privileges, the L., N. O. & T. Company paid the Natchez Company $180,000 in cash for the equity of redemption in its property, and also assumed payment of its bonds amounting to $1,250,000, which the L., N. O. & T. Company afterwards purchased, paying therefor $800,000 of its own gold bonds, which were a lien on its entire line of railroad (*id.*, p. 14). A copy of the conveyance upon such sale is annexed to the bill, from which it appears that the Natchez Company conveyed "all the railroad and other property of the party of the first part

lying, being and situated in the State of Mississippi, together with all franchises, rights, powers, privileges and immunities unto said party of the first part appertaining or belonging" (record, p. 35).

The bill then alleged that the privilege of the Natchez Company under section 21, the right to transfer the same, and the transfer itself, "were contracts which the respective parties thereto had a right to make at the time they were made and entered into, in view of the settled law as declared to them by the supreme court of said State at the time when such agreements were formed;" that the contracts were valid under the constitution and laws of the state as the same had been previously expounded; and that the obligation of the contract and the privilege under section 21 were binding upon the state and not to be impaired by subsequent change of judicial decision (*id.*, p. 15). It was then stated that section 21 was a contract "within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract" (*ib.*).

The bill then stated the ownership by the complainant of all but four shares of the capital stock of the Yazoo Company, which company in turn owned a large portion of the capital stock of the L., N. O. & T. Company, and alleged that the complainant had purchased $13,805,000 of the first mortgage bonds, $8,731,000 of the second mortgage bonds, and $8,347,000 of the income mortgage bonds of the L., N. O. & T. Company, all of said purchases being made in reliance upon the aforesaid legislation and decisions of Mississippi (*id.* pp. 17, 18). It was also stated that the $1,250,000 bonds of the Natchez Company acquired by the L., N. O. & T. Company had been used as collateral security for its first and second

mortgage bonds, including those purchased by the complainant, thus in effect including in the first and second mortgages of the L., N. O. & T. Company the property and immunities acquired from the Natchez Company, and passing to the complainant as part of its security the lien upon the property, immunities and franchises of the Natchez Company (record, p. 18).

The bill then stated the merger of the existence of the L., N. O. & T. Company into that of the Yazoo and Mississippi Valley Railroad Company, and alleged that all of the property, rights, franchises, privileges and immunities of the former company were transferred to and became the property, rights, privileges, franchises and immunities of the Yazoo Company. It was averred that such consolidation was effected on the faith of the previous legislative enactments already stated, and that a material part of the contract of consolidation was the fact that thereby the privilege of section 21, as applied to the taxes to be assessed against the property of the original L., N. O. & T. Company, as well as against the property acquired by it from the Natchez Company, should pass to and be enjoyed by the Yazoo Company (*id.*, p. 19). The case of *Railroad Co.* v. *Lambert*, 70 Miss. 779, 787, was then referred to as deciding that the rights under section 21, as acquired by the L., N. O. & T. Company by the sale from the Natchez Company, also passed to the Yazoo Company by the consolidation, and as reaffirming the doctrine of *Mississippi Mills* v. *Cook*, and holding that the privilege under section 21 enured to the L., N. O. & T. Company and to the Yazoo Company as to the property formerly of the Natchez Company, and that after the *Lambert* decision the complainant, in reliance thereon and on the previous decisions, issued and paid out many

of its own bonds in payment of obligations and indebtedness of the L., N. O. & T. Company, and in improvements, etc., thereon (record, p. 20).

The bill then showed the decision of the Mississippi Supreme Court in *Adams* v. *Yazoo and Mississippi Valley Railroad Company* (now under review in No. 244 on the docket of this term), holding, among other things, that section 21 was void under the constitution of 1869, thus overturning and reversing the "settled constitutional construction and the constitutional status of said statute and of similar statutes which had been repeatedly declared valid by the supreme court itself for fully twenty years," and had been commonly accepted and acted upon by all the departments of the state government, and by the constitutional convention of 1890 (*id.*, p. 21). It was averred that the last-mentioned decision, when sought to be practically applied, was not only subversive of the contract rights already set forth by giving effect to subsequent legislation, but also was in conflict with the Fourteenth Amendment in that it amounted to a deprivation of property without due process of law, and denied the equal protection of the laws (*ib.*), this resulting from the imposition of charges by retrospective assessments which created liabilities not in existence when complainant's rights were acquired.

The proceedings of the state revenue agent for the purpose of proceeding under the state law of 1894 to assess the property formerly of the Natchez Company for taxes between the years 1886 and 1891, inclusive, were stated, and it was alleged that the Railroad Commission had proceeded to assess such taxes against the Yazoo Company as owner at this time, and against the Natchez Company as owner during the years 1886 to 1890 inclu-

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sive, and against the property, at the rates therein stated, the total assessment thus made amounting to upwards of $50,000 (record, pp. 21, 22).

It was then alleged that in the years from 1886 to 1889, inclusive, the Natchez Company paid in each year, and in the years 1890 and 1891 the Louisville Company paid in each year, taxes assessable against the property of the Natchez Company, such taxes being paid on the construction debt of the Natchez railroad in conformity with section 21, and that these companies were in each of said years, respectively, qualified to make the affidavits provided for in section 21, and to have the receipts therein mentioned. It was stated that the Natchez and Louisville Companies were each extinct; that there were no officers of such companies qualified under their charters to make affidavits as provided in section 21, and that if the assessments for the years 1886 to 1891, inclusive, were to stand, the affidavits could not be made, although the conditions of section 21 as to payment on construction debt had been fully complied with (*id.*, pp. 23, 24).

The bill averred that suits had been brought for the recovery of the taxes upon the Natchez property for the years 1892 to 1897, inclusive, and for the taxes upon property originally belonging to the L., N. O. & T. Railway Company for the years 1886 to 1891, inclusive, and still other suits for the recovery of taxes upon the property originally of the Louisville Company for the years 1892 to 1897, inclusive (No. 244), in all of which suits the revenue agent attacked the validity of section 21 (*id.*, p. 29). The bill then stated that if taxes upon the Natchez property for the years 1886 to 1891, inclusive, should be collected, the

result would be that the sum of $60,000 would be paid out of the net earnings of that property, and to that extent would reduce the earnings of that property and of the property derived from the L., N. O. & T. Company, to the loss of the complainant and other holders of its second mortgage and income bonds, in each case the loss of the complainant being about four-fifths of the whole amount of taxes to be so collected; and that, if the revenue agent should prevail in the suits mentioned, further loss and damage would be inflicted upon the complainant and other holders of the second mortgage bonds to the amount of $1,080,000, of which $475,000 would be on account of transactions prior to the purchase of any of the bonds by the complainant in 1892, and under a claim not made until long after such purchase, and by means of retroactive assessment of taxes; and it was alleged that such collection of said taxes would impair the obligation of the complainant's contract of purchase of the bonds, in violation of the Federal Constitution, and would also deprive it of its property without due process of law, and would withhold from it the equal protection of the laws, in violation of the Fourteenth Amendment (record, pp. 29, 30).

It was then stated that under the laws of Mississippi the assessment about to be made by the railroad commission would become a public record in the counties and municipalities along the line of road, and that the tax collectors thereof were required to collect the same by seizure of the railroad company's property if the tax were not voluntarily paid; that the railroad commission threatened to send the record of assessment to the clerks of certain counties and to the authorities of certain municipalities through which the railroad ran, and that the complainant

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was thus threatened with a multiplicity of seizures and suits (record, pp. 31, 32). It was also alleged that the revenue agent threatened to bring suits for the recovery of the taxes, and the complainant asked that, to prevent multiplicity of suits, the court adjudicate the matters involved (*id.*, p. 32). The bill also stated that the assessments when made would constitute a lien upon the property of the Natchez Company preferential to the mortgages and other liabilities, and would cast a cloud upon the title, to the injury of the complainant and the holders of the first mortgage bonds of the Natchez Company and of the first and second mortgage bonds of the L., N. O. & T. Company, and invoked jurisdiction to prevent such cloud (*ib.*). It was also averred that a payment under protest would not avoid a multiplicity of suits, and that judgment against the various counties and municipalities would be of doubtful utility, because of their special organization and of costs and expenses, and that, so far as a suit against the state was concerned, a judgment would be of no value, because not enforceable by execution, thus leaving the complainant and the Yazoo Company without effectual remedy at law (*id.*, pp. 32, 33).

The prayer of the bill was for an injunction restraining the railroad commission from approving and certifying to the counties and municipalities the assessment on the railroad formerly of the Natchez Company for the years between 1886 and 1891 inclusive, and restraining the revenue agent from suing for the recovery of such taxes, or for the enforcement of the alleged lien thereof, and from "taking any proceeding looking to the subjection of the property of your orator, or of the railroad known as the Natchez & Jackson railroad, to the payment of the taxes so claimed;" and also for a decree that

the property of the complainant and the Natchez railroad was exempt from state and county taxation for such years, that the contract under section 21 be declared valid and binding, and that the assessment be decreed null and void, "and the cloud upon the title and right of your orator aforesaid be removed" (record, pp. 33, 34).

In substance, the bill thus showed a contract with the state for payment of taxes in a certain way; the right and interest of the complainant in that contract as a holder of bonds secured upon the property affected, and of stock in a proprietary company; the contracts evidenced by the bonds and by the mortgage securing the same; the attempted impairment of these contracts by subsequent legislation of the state; the extinction of the corporation, the bonds of which gave the complainant its interest and supported its right to sue; and the facts which gave jurisdiction in equity.

A restraining order was granted in accordance with the prayer of the bill in that respect (*id.*, p. 87) and was afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 128). An appeal from this order was dismissed by the Circuit Court of Appeals on the ground that that court had no jurisdiction of the appeal (*id.*, p. 133). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*) from which the complainant prayed an appeal to this court, the only error assigned being the action of the court below in dismissing the bill for want of jurisdiction (*id.*, pp. 133, 134). The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.*, p. 135).

The certificate has been quoted. The proceedings in

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the Circuit Court and the Circuit Court of Appeals were in all respects similar to those in No. 318, and, except as to jurisdiction claimed by reason of diversity of citizenship, to those in 320. After the dismissal of the appeal by the Circuit Court of Appeals, but before the dismissal of the bill in the Circuit Court, the state revenue agent brought suit in the Chancery Court of Hinds County, Mississippi, and therein recovered judgment against the appellant for the same taxes involved in this suit. An appeal has been taken from that judgment to the Supreme Court of Mississippi and remains undetermined. This appears from the affidavit of the appellee on file.

Specification of Errors.

The appellant specifies the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction based on diversity of citizenship.
2. That the court erred in refusing to assume jurisdiction because of the alleged lack of a federal question.
3. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

I.

EFFECT OF THE SUBSEQUENT JUDGMENT IN THE STATE COURT.

The subsequent suit and judgment for the recovery of taxes here involved can have no effect upon the jurisdiction of this court to entertain the appeal nor upon the jurisdiction of the Circuit Court to entertain the suit. The proper course is for the Circuit Court to determine the validity of this defense when interposed by plea and established in evidence. *Huntington* v. *Laidley*, decided March 19, 1900.

II.

JURISDICTION OF THIS COURT.

The appeal involves only questions of the jurisdiction of the Circuit Court as a court of the United States and

under the Federal Constitution and laws (*Huntington* v. *Laidley*, *supra*); and the practice followed was regular. *Shields* v. *Coleman*, 157 U. S. 168, 176; *Colvin* v. *Jacksonville*, 158 U. S. 456, 458.

III.

THE JURISDICTION OF THE CIRCUIT COURT.

The allegations of the bill of complaint make a case arising under the Federal Constitution and clearly within the jurisdiction conferred by the Act of August 13, 1888. *City Railway Co.* v. *Citizens' Street Railroad Co.* 166 U. S. 557, 562.

IV

THE SUIT IS NOT ONE AGAINST A STATE.

Attempted legislation in conflict with the Federal Constitution affords no protection to the acts of so-called state officers assuming to act under the authority of such legislation (*Fitts* v. *McGhee*, 172 U. S. 516, 529; *Virginia Coupon Cases*, 114 U. S. 270, 288); and as to county and municipal taxes which here constituted the greater part of the amount in controversy, the Eleventh Amendment certainly does not apply. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

For these reasons and upon the authorities contained in our brief in No. 318, it is submitted that the decree of the circuit court should be reversed and the cause remanded for further proceedings.

Washington, October Term, 1899.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

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No. 320. 79

Affidavit for Appt.

RECEIVED
NOV 6 1899
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,

Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

AFFIDAVIT OF EDWARD MAYES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATE OF TENNESSEE,
Shelby County.

Personally appeared before me Sam Holloway, a Notary Public, in and for the State and County aforesaid, Edward Mayes, an attorney at Law of Jackson, Mississippi, who, being by me duly sworn on oath, says:

That on the 25th day of April, 1899, Wirt Adams, State Revenue Agent of the State of Mississippi, did bring in the Circuit Court of the County of Hinds, State of Mississippi, First District thereof, two suits against the Yazoo & Mississippi Valley Railroad Co., and the Illinois Central Railroad Co., whereby he demanded and sought to recover in the one suit, certain taxes assessed for the year 1898, by the Railroad Assessors for the State of Mississippi, against the property which had formerly been property of the Louisville, New Orleans & Texas Railway Co., amounting to about Ninety-five Thousand ($95,000) Dollars,—and in the other, certain other taxes for the year 1898, assessed by the State Railroad Assessors against the property which had formerly been the property of the Natchez, Jackson & Columbus Railroad Co., amounting to about Fifteen Thousand ($15,000) Dollars; that the said taxes so sued for were the same identical taxes as to which the Yazoo & Mississippi Valley Railroad Co. had theretofore filed its bill of injunction in the Circuit Court of the United States, at Jackson, Mississippi,—in which bill such proceedings were had, that the same was by the said Court dismissed on the first Monday of May, 1899,—from which decree of dismissal the said Yazoo & Mississippi Valley Railroad Co. took an appeal to the Supreme Court of the United States, which appeal is now pending in said Supreme Court of the United States, and is numbered 320

on the Docket for the October term, 1899; that in the said suits at law hereinbefore mentioned, such proceedings were had, that at the June term of said Circuit Court, judgments were duly rendered against the defendants to the full amount of the taxes demanded; that in each of said suits the said defendants duly prayed an appeal to the Supreme Court of the State of Mississippi, with supersedeas, which was granted on the execution of the usual supersedeas bond in double the amount in each case of the judgment recovered; that said supersedeas bonds were duly executed and approved, and the said causes and judgments so superseded are now pending in the Supreme Court of the State of Mississippi, un-determined.

EDWARD MAYES.

Sworn to and subscribed before me this the 30th day of October, 1899.

SAM HOLLOWAY,
Notary Public.

[NOTARIAL SEAL.]

No. 320. 79

SUPREME COURT U. S.
FILED
NOV 6 1899
JAMES H. McKENNEY,
Clerk.

Brief of Guthrie, Fentress & Mayes for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 320.

ON MOTION TO DISMISS OR AFFIRM.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY
Appellant,
vs.
WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

WASHINGTON, November 6, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,
Appellant,

vs.

WIRT ADAMS, State Revenue Agent, *et als.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

This motion involves substantially the same points as are made in the motion for the same relief in No. 318, although the records in the two cases are not altogether alike. Counsel for the appellant pray they may refer to their brief filed in opposition to the motion in No. 318, one of the same series of cases, so far as it covers the ground of this motion, merely replying here to such portions of the additional brief filed by Messrs. Calhoon and Green as seem to require attention. This course will save the labor of the court and avoid unnecessary repetition.

Jurisdiction is not claimed by reason of diversity of citizenship, for the case, like No. 318, is one arising under the Federal Constitution. In substance, the bill alleges the incorporation by the Mississippi legislature of the Natchez and Jackson (afterwards Natchez, Jackson and Columbus) Railroad Company by act ap-

proved July 21, 1870 (record, p. 2); the passage of an act on August 8, 1870, extending to the Natchez and Jackson Railroad Company the privileges of section 21 of the charter of the Mobile and Northwestern Railroad Company (*id.* p. 3), and the provisions of said section 21 which are as follows:

> "SEC. 21. *Be it further enacted*, That in consideration of the construction of the Railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company, (AND WHICH AGREEMENT IS IRREPEALABLE), that all taxes to which said Company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company, upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said Company in constructing the same; and it shall be the duty of the Tax Collector in every county in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said Company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said Company shall be subject; *provided, however*, That, whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

It is then alleged that the Natchez and Jackson Railroad Company, in reliance upon the provisions of section 21,

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expended large sums of money in the construction of its road and incurred a construction debt evidenced by bonds to the amount of $1,250,000. The provisions of section 21, so accepted by the Natchez and Jackson Railroad Company, are alleged to have constituted a contract between it and the State of Mississippi for the appropriation of the amount of the taxes to the payment of the construction debt, irrepealable for thirty years from August 8, 1870. For such purpose during each year a receipt for the taxes was required to be given to the railroad company upon proof of the appropriation thereof as required by section 21 (*id.*, p. 3).

The bill then stated the incorporation of the Memphis and Vicksburg Railroad Company on August 8, 1870; the act of March 3, 1882, authorizing consolidation between the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company "with all the rights, privileges, immunities, franchises," etc., of the constituent companies (*id.*, p. 4); the amendatory act of March, 1884, by which the Memphis and Vicksburg Railroad Company was authorized to consolidate with any other railroad company or companies, and entitling the company so formed to the same rights, immunities, etc., given by the act of March 3, 1882. It was provided by section 5 of the act of March 3, 1882, that the provisions of section 21 of the Mobile and Northwestern charter should apply to any company consolidated under its provisions (*id.*, p. 5).

It was further set forth that under the acts of 1882 and 1884 the Memphis and Vicksburg Railroad Company and the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company were consolidated so as to become the Louisville, New Orleans and Texas Railway

Company, and that under the charters of its constituent companies this company constructed the railroad contemplated thereby. It was stated that the consolidated company was organized in reliance upon the provisions of the act of 1882, including section 21, which had been extended to it; and that section 5 of the act of 1882 above referred to constituted a contract between the State of Mississippi and the consolidated company of the same effect as already alleged in respect of the Natchez and Jackson Railroad Company (*ib.*).

It was then shown that in 1890 an act was passed authorizing the Natchez, Jackson and Columbus Railroad Company to sell its railroad, together with all its franchises, privileges and immunities, and that in pursuance thereof it afterwards sold to the consolidated company its railroad, with its franchises, privileges and immunities, subject to the aforesaid construction debt of $1,250,000. Afterwards the consolidated company bought the bonds representing this construction debt for $890,000 of its own first mortgage bonds secured by a mortgage on its entire line of railroad, and used the $1,250,000 bonds of the Natchez, Jackson and Columbus Railroad Company as collateral security for its first and second mortgage bonds (*id.*, p. 6).

The bill alleged that the complainant was incorporated by special act approved February 17, 1882, and that on October 24, 1892, the Louisville, New Orleans and Texas Railway Company and the complainant pursuant to the authority conferred by their respective charters effected a consolidation whereby the former company was merged into the complainant company and "all of the property, real and personal, and all of the rights, franchises, privileges and immunities" of the former company, "including as

part thereof all the property, real and personal, all of the rights, franchises, privileges and immunities that had been of the Natchez, Jackson and Columbus Railroad Company were transferred to and became the property, rights, privileges, franchises and immunities" of the complainant; and that among the latter were the contract rights of the Natchez, Jackson and Columbus Railroad Company under section 21 of the Mobile and Northwestern charter, and the rights thereunder of the Louisville, New Orleans and Texas Railway Company as acquired by the sales and consolidations already set forth. It was stated that the complainant from the date of the consolidation had by virtue of these contracts been entitled to the "full exercise and enjoyment of the rights aforesaid by the legislation aforesaid contracted and conferred" (*id.*, pp. 6, 7).

It was shown that the state railroad commission had assessed the property originally of the Natchez, Jackson and Columbus and of the Louisville, New Orleans and Texas Companies for the taxes of 1898 under the provisions of the chapter on revenue of the Mississippi Annotated Code of 1892; that the complainant had the right to pay said taxes by appropriation of the amount thereof under the provisions of section 21 and by making the necessary affidavit of the application in conformity with the statute; that it had so appropriated and applied the amounts of taxes assessed against the respective properties, and had tendered the statutory affidavits; but that the defendants, the state revenue agent and the sheriffs of the various counties, disregarding the complainant's contract rights, and claiming the payment of the taxes in currency, were about to attempt the collection of the taxes imposed by multiplicity of suits and seizures (*id.*, pp. 8, 9). It was

alleged that the assessments thus made constituted a lien which had really been satisfied and discharged in full, and that the claims of the sheriffs and the state revenue agent constituted a continuing cloud upon the complainant's title; that the complainant could not pay the taxes under protest and then sue to recover them back without being subjected to a multiplicity of suits; that in case of payment there was doubt as to the possibility of recovering the amounts paid to the different municipalities and counties, and that a suit against the state for that purpose would be unavailing (*id.*, p. 9).

It was expressly alleged that the threatened action of the defendants was to be taken under the revenue law passed in 1892 and under the act of 1894 defining the office and powers of the state revenue agent, both of which were subsequent to the legislation already recited conferring the right to appropriate the taxes to the payment of the construction debt and in violation of section 10 of Article I. of the Constitution of the United States (*id.*, p. 10). The decision of the Supreme Court of Mississippi in *Railroad Co.* v. *Lambert*, 70 Miss. 779, 790, wherein that court sustained the rights claimed under the Natchez, Jackson and Columbus charter, as extended by the provisions of section 21, was referred to as *res adjudicata* upon the claims of the defendants (*id.*, p. 11). It was also alleged that sections 180 and 181 of the state constitution of 1890 were an impairment of the contract rights of the complainant (*ib.*).

The prayer of the bill was, in substance, for an injunction against the bringing of suits for the recovery of the taxes or seizing the defendant's property therefor, "or taking any steps or proceedings whatever for the collection and recovery of such taxes;" that it be adjudged that the

complainant's property was under no liability for the taxes; and that the cloud arising from the assessment be removed from the title of the complainant to its property; and for further relief (*id.*, p. 13).

A restraining order having been granted, the same was afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 51). An appeal from this order was dismissed by the Circuit Court of Appeals upon the ground that that court had no jurisdiction of the appeal (*id.*, p. 56). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*), from which the complainant took an appeal to this court, assigning as error the action of the court in dismissing the bill for want of jurisdiction. The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.* p. 58). During the same term the Circuit Court certified at length as to the issues and the proceedings in that court, the certificate concluding as follows:

> "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the ground hereinbefore stated, namely:
>
> "(1) That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.
>
> "(2) That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (*id.*, pp. 62, 63).

BRIEF.

As stated on page 1, our brief in No. 318 answers the various points made by the appellees on this motion.

There are, however, additional points urged in support of the present motion, and these additional points will now be discussed so far as it appears necessary to answer them. For convenience we shall follow the numbering of the brief filed by Messrs. Calhoon and Green and answer the points that merit attention.

1 and 3.

The certificate states the two questions of federal jurisdiction in the clearest possible way. It could not have framed those questions more explicitly. *Colvin* v. *Jacksonville*, 158 U. S. 456, 459. The restraining order was discharged for want of jurisdiction (record, p. 51), and the appeal to this court was prayed and allowed upon the same ground (*id.* p. 58).

5, 6, 7 and 8.

It is idle to contend that the appellant had an election, after the making of the order denying the motion for an injunction *pendente lite*, whether to appeal to the Circuit Court of Appeals or to this court. The order was in no sense a final decree. It did not purport to dismiss the bill, but left the suit still pending for further proceedings. In the only case cited which seems to support the claim the *bill had been actually dismissed*. *Railway Co.* v. *Railroad Co.*, 117 Ill. 611, 614. It is true that the grounds of the order denying the injunction may have been such as to indicate that the final decree would go against the complainant; but until that final decree was made, there was nothing on which to base an appeal to this court, and hence there could be no election. There is no question or danger of two appeals at the same time from the same decree. The Act of March 3, 1891, as amended by the Act of February 18, 1895 (28 Stat. 666), expressly provides for an appeal

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from such an interlocutory order as was made in this cause; and nothing in the act indicates that it was intended to cut off an appeal from a final decree when rendered. That result could only occur if the Circuit Court of Appeals should exercise any authority conferred upon it by the Act of 1895 to determine the whole case finally on an appeal from an order discharging a temporary injunction. In any event, the Circuit Court of Appeals had no jurisdiction of the only appeal taken to it; and that can hardly be said to have been an election which resulted in no hearing or adjudication upon the merits.

The entry of the final decree brought the appellant's case precisely within the first conclusion tabulated by the Chief Justice in *United States* v. *Jahn*, 155 U. S. 109, 114, as follows: "(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court." The case is not included in any one of the other four divisions into which the subject is divided in this opinion.

But the main point is that, whatever revisory power the Circuit Court of Appeals might have exercised, and whatever form of decree it might have entered, its appellate jurisdiction was not exercised in fact, and its decision upon the question of its own jurisdiction left the cause precisely where it was when the appeal from the interlocutory order was taken. That court said:

> "We express no opinion on the question of the jurisdiction of the circuit court, further than to say that the constitutional questions on which we base our conclusion as to the appellate jurisdiction of this court were necessarily considered in reaching a decision on the question of the jurisdiction of the circuit court. This much seems pertinent, if not necessary, in view of

the fact that the interlocutory orders of the circuit court recite that, in its opinion, it was without jurisdiction of the cases. The appeals are dismissed." *Illinois Cent. R. Co.* v. *Adams*, 93 Fed. Rep., 852, 856.

9

The question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the state courts, and in some cases in direct opposition to the rulings of those tribunals. *McCullough* v. *Virginia*, 172 U. S. 102, 109; *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475, 487. In no class of cases has this court oftener exercised this power to determine for itself the existence of an alleged contract than in the long line of decisions involving so-called exemptions or immunities from taxation.

10

It is difficult to see how the Circuit Court of Appeals could have certified any question to this court excepting that of its own jurisdiction. *Green* v. *Mills*, 25 U. S. App. 383, 392, read in connection with *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181, rules that where the federal question is not controlling, the Circuit Court of Appeals may take jurisdiction and decide the case on non-federal points. There is a radical distinction between such a case and the case at bar. Here the federal question was treated as controlling by the Circuit Court of Appeals. That court said:

"By the averments of the bills, nothing is left to inference as to the complainants' claims raising other constitutional questions. The gravamen of each case is that the complainant is being deprived of contract rights secured by the constitution of the United States. The claim in each case is that the complainant is entitled by contract to be exempted from paying certain taxes,

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and that, pursuant to statutes of the state of Mississippi passed subsequent to the charters or contracts in question, the officers of the state are proceeding to assess and collect these taxes,—and that to do this would deprive the complainant of rights secured by the constitution of the United States. * * * *The court that renders final decrees in these cases must, either directly or indirectly, decide these constitutional questions.*" 93 Fed. Rep. 856.

Entertaining these views the court necessarily refused to retain jurisdiction of the appeal. Upon the question of the jurisdiction of the Circuit Court of Appeals see *Hamilton* v. *Drisdale's Executors*, 2 U. S. App. 540, 546; *City of Macon* v. *Georgia Packing Co.*, 13 U. S. App. 592, 595; *Chicago, Milwaukee, &c., R'y Co.* v. *Evans*, 19 U. S. App. 233, 235; *Hastings* v. *Ames*, 32 U. S. App. 485, 487; *Town of Westerly* v. *Westerly Water Works*, 33 U. S. App. 723, 729; *Barr* v. *New Brunswick*, 39 U. S. App. 187; *Holt* v. *Indiana Manufacturing Co.*, 46 U. S. App. 717, 719; *Indianapolis* v. *Central Trust Company*, 53 U.S. App. 658, 664; *Pauly Jail Building Co.* v. *Crawford County*, 56 U. S. App. 53; *Wrightman* v. *Boone County, Arkansas*, 60 U. S. App. 100, 103.

Although the Circuit Court of Appeals might have considered the entire case on the merits and rendered a final decree if it had retained jurisdiction, it did not do so, and there has been no final adjudication or decree except that rendered by the Circuit Court. Under no possible construction of the acts conferring juridiction could this court have entertained an appeal from the interlocutory order vacating the injunction. *Kirwan* v. *Murphy*, 170 U. S. 205, 210.

II.

The Circuit Court refused to continue the restraining order because it had no jurisdiction. The Circuit Court of Appeals declined to review this order because it in turn

had no jurisdiction, the case being one in which an appeal from the final decree should be taken exclusively to this court. In view of these two facts, there having been no decision by any court upon the merits, it is not candid to say that the proceedings below have "left adjudged * * every question within the appellate jurisdiction of the Court of Appeals presented by the record." Nothing has been adjudged except the lack of jurisdiction of each court. It is indeed doubtful if a writ of certiorari would have been issued by this court to review the order dismissing the appeal. *In re Tampa Suburban Railroad Company*, 168 U. S. 583, 587. We do not now attack the adjudication of the Circuit Court of Appeals. On the contrary, we attempt to follow its ruling that this cause involves the application of the Federal Constitution and the validity of state laws claimed to be in contravention of the Constitution of the United States. It follows that the case is one arising under that instrument, and by reason of its subject matter is within the jurisdiction of the Circuit Court.

13, 14 and 15.

The disclaimers by the tax collectors only convict them of neglect of the duty attempted to be imposed by the revenue law of 1892. Section 3884 of the Annotated Code of that year provides as follows:

> "The tax-collectors shall collect the railroad tax from said roads in all respects as *he* collects other taxes; but in case of a sale for delinquent railroad taxes, the collector shall first seize and sell personal property or lands other than the roadbed; and, secondly, rolling stock; and, lastly, the roadbed of the railroad in his county."

Section 3802 of the same code provides:

> "All taxes remaining unpaid on the 15th day of December, shall immediately be collected by the collector, by distress and sale of any personal property liable therefor."

Moreover, the appellees' counsel in making these

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points have strangely overlooked the provision of the revenue law (Annotated Code, sec. 3746) which declares that "all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; * * * the taxes shall be a charge on the land or personal property taxed." The tax was, therefore, much more than a mere "personal liability," and the complainant was entitled to invoke the jurisdiction of a court of equity, not only to prevent the multiplicity of suits with which the state revenue agent threatened it, but also to remove the cloud on its title caused by the lien, and to restrain the distress and sale which the statute required the state officials to make.

16 and 17.

We decline to consider as seriously made the assertion that the state railroad commission is a judicial tribunal whose proceedings are entitled to such weight as to override the contract clause of the Federal Constitution.

18.

The real ground of jurisdiction is that this is a case arising under the Constitution of the United States. "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. * * * Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one." *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S.

557, 563, 564. The jurisdiction being thus settled, we shall not attempt to follow the inconsistent argument by which counsel attempts to drag this court into a premature consideration of the merits of the case on the pretense of want of jurisdiction. These questions are involved in the pending writ of error No. 244, where the court upon a similar motion to dismiss has postponed the consideration of these questions to the hearing upon the merits.

As to the second main ground, we do not understand that until now any one was ever supposed to claim that the Eleventh Amendment *conferred* jurisdiction of any case.

The last additional point refers to the subsequent judgment in the state court as a "bar to the further prosecution of this appeal," not apparently for the reason that the judgment of the state court makes this appeal unavailing, but because that judgment has entirely deprived this court of power to hear and determine the appeal. Such an application of the rule of *res adjudicata* to the case at bar would result in a perversion of the jurisdiction of the federal courts. It is impossible for the appellant to gain redress for the judicial impairment of its contract in the courts of Mississippi except by the grace of those tribunals. This court has no jurisdiction of a writ of error to the state court based merely upon such a judicial impairment, the jurisdiction under the contract clause of the Federal Constitution being limited to cases of legislative impairment. But in a case like the present, within the original jurisdiction of the Circuit Court of the United States, that court has power to determine the existence of the contract and to construe its terms in accordance with the laws of the state as declared at the time the contract

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was made, independently and in disregard of any subsequent change of judicial opinion; and an appeal in such a case brings to this court "the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State." *Central Land Company* v. *Laidley*, 159 U.S. 103, 111. This is the question which the appellant asks to have determined in the administration of the original jurisdiction of the federal courts, and in this way it seeks immunity from the revolutionary consequences of the decision of the state court in the principal case (No. 244).

Being thus rightfully in the federal court, the appellant was cast forth from that forum by the erroneous refusal to assume jurisdiction of the cause. But this was not the end of the suit. It was forthwith removed to this court by appeal, which operated as a continuation of the cause and left it still, as it is now, a pending litigation. If, as we submit, the Circuit Court had jurisdiction of the suit and this court likewise has jurisdiction of the appeal, then the cause ought to be remanded to the court of original jurisdiction for a hearing and determination upon the merits. Under these circumstances, can it be possible that the appellees, in defiance of this appeal, can impair or rather nullify the jurisdiction of this tribunal by proceeding in a state court in the very teeth of this appeal, and successfully maintain that this subsequent proceeding has ousted the jurisdiction of the federal courts? In no other way can the precise question arising under the Federal Constitution be raised and determined in this court. "A denial of jurisdiction forbids all inquiry into the nature of the case" *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 847. If that denial of jurisdiction was erroneous, we are now entitled as matter of right to a hearing

on the merits. To say that federal jurisdiction having once attached it can be destroyed or ousted by the subsequent action of any state court would leave suitors in the federal courts utterly without remedy, although their causes be within the constitutional jurisdiction of those courts. The doctrine of *res adjudicata*, originally established "to secure the peace and repose of society by the settlement of matters capable of judicial determination," and "essential to the maintenance of social order,"[1] would be subverted to a purpose farthest from peace, repose and social order, for under its guise a jurisdiction meant to be paramount would be frittered away by the unwarranted application of a technical rule never intended or permitted to work injustice, and we would have the state courts racing to enter judgment before this court could decide an appeal.

For the foregoing reasons it is urged that the question of jurisdiction should be reserved for full argument at the bar.

Counsel also submit that this whole series of Mississippi Tax Cases should be heard upon one argument, so that the whole question may be covered and disposed of at one time, and counsel will, therefore, move this court in due time to have these various cases heard together when the first case, No. 244, is reached for argument.

Washington, November 6, 1899.

WILLIAM D. GUTHRIE,
JAMES FENTRESS,
EDWARD MAYES,
Of counsel for appellant.

[1] *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, 49.

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JAMES H. McKENNEY,
Clerk

No. 328. 79

Brf. of Guthrie, Mayes, Fentress & Dickinson for Appt.

MISSISSIPPI TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 4, 1900.

No. 328.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

WASHINGTON, October Term, 1899

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, State Revenue Agent, *et al.*

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR APPELLANT.

This appeal presents for review a final decree of the Circuit Court of the United States for the Southern District of Mississippi (record, p. 56) which dismissed the bill of complaint for want of jurisdiction. The appeal was prayed and allowed under section 5 of the act of March 3, 1891, (*id.*, pp. 56, 58), and the judge holding the circuit court certified at length during the same term as to the issues and the proceedings in that court, the certificate concluding as follows:

> "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the ground hereinbefore stated, namely:
>
> "1. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.
>
> "2. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment to the Constitution of the United States" (record, pp. 62, 63).

Motions in this court to dismiss or affirm were submitted on November 6, 1899, and the decision postponed to the hearing on the merits.

So far as the present appeal is concerned, the case presents in substance the same questions of jurisdiction here and below as are involved in Nos. 318 and 319, although the contract claimed to be impaired differs from that in question in No. 318 in that it here provides for an appropriation of taxes to the payment of construction debt instead of an exemption (as in Nos. 244 and 319). Jurisdiction in the court below is not claimed by reason of diversity of citizenship, for the case, like Nos. 318 and 319, is one arising under the contract clause of the Federal Constitution. Counsel for the appellant desire to make a statement of the facts necessary to the consideration of the appeal, and to specify the errors complained of, and pray leave to refer to their brief filed in No. 318 for a discussion of the questions of law arising upon this record.

Statement of the case.

The bill was filed by the appellant, a corporation of Mississippi, against the state revenue agent of that state and the sheriffs of certain counties therein, all the defendants being citizens of Mississippi (record, pp. 1, 2), for the purpose of restraining the enforcement of taxes which, it was alleged, the defendants were attempting to enforce in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment. The bill alleged the incorporation by the Mississippi legislature of the Natchez and Jackson (afterwards Natchez, Jackson and Columbus) Railroad Company by act approved July 21, 1870 (*id.*, p. 2), and the passage of an act on August 8,

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1870, extending to that company the provisions of section 21 of the charter of the Mobile and Northwestern Railroad Company (record, p. 3), which are as follows (*id.*, p. 2):

> "SECTION 21. Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company (and which agreement is irrepealable), that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax collector in every county in each and every year, to give to said company a receipt in full for the amount of said taxes, upon receiving from the said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, State and municipal, to which said company shall be subject; provided, however, that whenever the profits of said company shall enable said company to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector to be by him paid over as required by law."

The bill then alleged that the Natchez and Jackson Railroad Company, in reliance upon the provisions of section 21, expended large sums of money in the construction of its road and incurred a construction debt evidenced by bonds to the amount of $1,250,000. The provisions of section

21, so accepted by the Natchez and Jackson Railroad Company, are alleged to have constituted a contract between it and the State of Mississippi for the appropriation of the amount of the taxes to the payment of the construction debt, irrepealable for thirty years from August 8, 1870. For such purpose during each year a receipt for the taxes was required to be given to the railroad company upon proof of the payment of the amount of the taxes upon construction debt, as required by section 21 (record, p. 3).

The bill then stated the incorporation of the Memphis and Vicksburg Railroad Company in 1870 (*id.* p. 4); the act of March 3, 1882, authorizing consolidation between that company and the Mississippi Valley and Ship Island Railroad Company with all "the rights, privileges, immunities, franchises, etc., of the constituent companies" (*ib.*); and the amendatory act of 1884 by which the Memphis and Vicksburg Company was authorized to consolidate with any other railroad company and entitling the company so formed to the same rights, immunities, etc., given by the act of March 3, 1882. It was provided by section 5 of the act of 1882, that the provisions of section 21 of the Mobile and Northwestern charter should apply to any company consolidated under its provisions (*id.*, p. 5).

It was further set forth that under these acts the Memphis and Vicksburg Company and the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company were consolidated so as to become the Louisville, New Orleans and Texas Railway Company; that under the charters of its constituent companies this company constructed the railroad contemplated by those charters; that the consolidated company was organized in reliance upon

the provisions of the act of 1882, and that section 5 of the act of 1882 above referred to constituted a contract between the State of Mississippi and the consolidated company of the same effect as already alleged in respect of the Natchez and Jackson Railroad Company (*ib.*).

It was then alleged that in 1890 an act was passed authorizing the Natchez, Jackson and Columbus Company to sell its railroad, together with all its franchises, privileges and immunities; that in pursuance thereof it afterwards sold to the consolidated company (the L., N. O. & T. Co.) its railroad, with its franchises, privileges and immunities, subject to the aforesaid construction debt of $1,250,000, and that afterwards the consolidated company bought the bonds representing this construction debt for $890,000 of its own first mortgage bonds secured by a mortgage on its entire line of railroad, and used the $1,250,000 bonds of the Natchez, Jackson and Columbus Railroad Company as collateral security for its first and second mortgage bonds (*id.*, p. 6.)

The bill alleged that the complainant was incorporated by special act, and that on October 24, 1892, the L., N. O. and T. Company and the complainant, pursuant to the authority conferred by their respective charters, effected a consolidation whereby the former company was merged into the complainant company and "all of the property, real and personal, and all of the rights, franchises, privileges and immunities" of the former company, "including as part thereof all the property, real and personal, all of the rights, franchises, privileges and immunities that had been of the Natchez, Jackson and Columbus Railroad Company were transferred to and became the property, rights, privileges, franchises and immunities" of the

complainant; and that among the latter were the contract rights of the Natchez, Jackson and Columbus Company under said section 21, and the rights thereunder of the L., N. O. and T. Company as acquired by the sales and consolidations already set forth. It was stated that the complainant from the date of the consolidation had by virtue of these contracts been entitled to the "full exercise and enjoyment of the rights aforesaid by the legislation aforesaid contracted and conferred" (*id.*, pp. 6, 7).

It was shown that the state railroad commission had assessed the properties originally of the Natchez, Jackson and Columbus and of the Louisville, New Orleans and Texas Companies for the taxes of 1898 under the provisions of the chapter on revenue of the Mississippi Annotated Code of 1892; that the complainant had the right to pay said taxes by appropriation of the amount thereof under the provisions of section 21 and by making the necessary affidavit of the application in conformity with the statute; that it had so appropriated and applied the amounts of the taxes assessed against the respective properties, and had tendered the statutory affidavits; but that the defendants, the state revenue agent and the sheriffs of the various counties, disregarding the complainant's contract rights, and claiming the payment of the taxes in currency, were about to attempt the collection of the taxes imposed by multiplicity of suits and seizures (*id.*, pp. 7, 8, 9). It was alleged that the assessments thus made constituted a lien which had really been satisfied and discharged in full, and that the claims of the sheriffs and the state revenue agent constituted a continuing cloud upon the complainant's title; that the complainant could not pay the taxes under protest and then sue to recover them back without being subjected to a multiplicity of suits;

that in case of payment there was doubt as to the possibility of recovering the amounts paid to the different municipalities and counties, and that a suit against the state for that purpose would be unavailing (*id.*, p. 9).

It was expressly alleged that the threatened action of the defendants was to be taken under the revenue law passed in 1892, and under the act of 1894 defining the office and powers of the state revenue agent, both of which were subsequent to the contract conferring the right to appropriate the taxes to the payment of construction debt and in violation of section 10 of Article I. of the Constitution of the United States (*id.*, p. 10), and that sections 180 and 181 of the state constitution of 1890 were an impairment of the contract rights of the complainant (*id.*, p. 11).

The prayer of the bill was, in substance, for an injunction against the bringing of suits for the recovery of the taxes or seizing the defendant's property therefor, "or taking any steps or proceedings whatever for the collection and recovery of such taxes;" that it be adjudged that the complainant's property was under no liability for the taxes; and that the cloud arising from the assessment be removed from the title of the complainant to its property; and for further relief (*id.*, p. 13).

Shortly stated, the bill thus showed contracts between the state and the complainant and its assignor for the appropriation of taxes to the payment of construction debt; a vesting of these contract rights, together with the property affected by them, in the complainant; the expenditure of large amounts of money in reliance upon the contracts; subsequent state legislation which had the effect to impair the rights granted by the contracts; and facts justifying the interposition of a court of equity.

A restraining order having been granted, the same was

afterwards discharged by interlocutory order on the ground that the Circuit Court had no jurisdiction of the cause (*id.*, p. 51). An appeal from this order was dismissed by the Circuit Court of Appeals upon the ground that that court had no jurisdiction of the appeal (*id.*, p. 56). A final decree was then entered in the Circuit Court dismissing the bill (*ib.*), from which the complainant prayed an appeal to this court, assigning as error the action of the court in dismissing the bill for want of jurisdiction. The order granting the appeal stated: "This appeal is granted solely upon the question of jurisdiction, *this court having refused to assume jurisdiction in this cause*" (*id.*, p. 58).

The certificate has already been quoted. With the exception of the statement as to the question of jurisdiction based upon diverse citizenship, the proceedings in the Circuit Court and in the Circuit Court of Appeals were in all respects similar to those in Nos. 318 and 319. After the dismissal of the appeal by the Circuit Court of Appeals, but before the dismissal of the bill in the Circuit Court, the state revenue agent brought suit in the Circuit Court for Hinds County, Mississippi, and therein has recovered judgment against the appellant for the same taxes involved in this suit. An appeal has been taken from that judgment to the Supreme Court of Mississippi, and a *supersedeas* bond given. This appears from the affidavits of the appellee and of Mr. Edward Mayes on file. That appeal is still pending.

Specification of Errors.

The appellant specifies the following errors of the court below:

1. That the court erred in refusing to assume jurisdiction because of the alleged lack of a federal question.

2. That the court erred in refusing to assume jurisdiction on account of the Eleventh Amendment.

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I.

EFFECT OF THE SUBSEQUENT JUDGMENT IN THE STATE COURT.

The subsequent suit and judgment for the recovery of taxes here involved can have no effect upon the jurisdiction of this court to entertain the appeal nor upon the jurisdiction of the Circuit Court to entertain the suit. The proper course is for the Circuit Court to determine the validity of this defense when interposed by plea and established in evidence. *Huntington* v. *Laidley*, decided March 19, 1900.

II.

JURISDICTION OF THIS COURT.

The appeal involves only questions of the jurisdiction of the Circuit Court as a court of the United States and under the Federal Constitution and laws (*Huntington* v. *Laidley*, *supra*); and the practice followed was regular. *Shields* v. *Coleman*, 157 U. S. 168, 176; *Colvin* v. *Jacksonville*, 158 U. S. 456, 458.

III.

THE JURISDICTION OF THE CIRCUIT COURT.

The allegations of the bill of complaint make a case arising under the Federal Constitution and clearly within the jurisdiction conferred by the Act of August 13, 1888. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 562.

IV.

THE SUIT IS NOT ONE AGAINST A STATE.

Attempted legislation in conflict with the Federal Constitution affords no protection to the acts of so-called state officers assuming to act under the authority of such legislation (*Fitts* v. *McGhee*, 172 U. S. 516, 529; *Virginia Coupon Cases*, 114 U. S. 270, 288); and as to county

and municipal taxes which here also constituted the greater part of the amount in controversy, the Eleventh Amendment certainly does not apply. *Lincoln County* v. *Luning*, 133 U. S. 529.

Conclusion.

For these reasons and upon the authorities referred to in our brief in No. 318 the decree of the Circuit Court should be reversed and the cause remanded for further proceedings.

Washington, October Term, 1899.

WILLIAM D. GUTHRIE,
EDWARD MAYES,
NOEL GALE,
For the appellant.

JAMES FENTRESS,
J. M. DICKINSON,
Of counsel.

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No. 318
Br. of Beckett for Appellees (mo

FILED
SEP 27 1899
JAMES H. MCKENNEY,

Filed Sept. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF SAME.

R. C. BECKETT,
Attorney for the Motions.

(17,432.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-26-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 318.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Come all the appellees, except said Canton, Aberdeen and Nashville Railroad Company, and move this honorable court to dismiss this appeal, first, because it is an appeal in an injunction suit, and the purpose and object of said injunction bill have failed; and, second, because this court has no jurisdiction of this appeal; or to affirm the decree, it being man-

ifest that even if this court has jurisdiction, the said appeal was unnecessary and taken for delay only, and, besides, the questions on which jurisdiction depends are so frivolous as not to need further argument.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*, *vs.* WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Appeal from the circuit court of the United States for the southern district of Mississippi.

NOTICE.

To Mr. EDWARD MAYES,
Attorney of Record for Appellant in the Above-entitled Case:

You are hereby notified that the appellees, except the said Canton, Aberdeen and Nashville Railroad Company, in the above-named cause will, on Monday, the — day of —, A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm and the brief of the argument thereon hereto attached.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Moseley, clerk of said circuit court of the United States for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above-named Wirt Adams, one of said appellees, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he duly delivered in person to Mr. Edward Mayes, one of the attorneys of record for the above-named appellant, in person, a true copy of the attached motion, notice, and brief of the argument, together with a copy of his affidavit on file.

Sworn to and subscribed before me this day of , 1899.

, *Clerk*.

, *Appellee*.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees*. } No. 318.

Statement and Brief on Motions to Dismiss or Affirm.

STATEMENT.

This is an injunction suit by the appellant, The Illinois Central Railroad Company, against the Mississippi Railroad Commission and State railroad assessors and their clerk, and the State revenue agent, and the Canton, Aberdeen and Nashville Railroad Company, in the circuit court of the United States for the southern district of Mississippi, to prevent a completed assessment and a suit for taxes against the property of said Canton, Aberdeen and Nashville Railroad Company for the back taxes of the years 1886–1897, inclusive.

The ground on which the Illinois Central Railroad Company claims the right to bring the bill is that it is the lessee of the property and a creditor and mortgage bondholder of said Canton, Aberdeen and Nashville Railroad Company.

Pars. 7, 8, 16, 19; Record, pp. 7–9, 17, 20.

It was once the owner of all the bonds, amounting to $2,000,000, but for some reason a subsequent mortgage was executed, and under it bonds to the amount of $1,750,000

were issued and sold, and a like amount of the $2,000,000 bond issue were surrendered, and a note secured by a second mortgage taken for the balance. It is not shown how many or really whether the Illinois Central Railroad Company is now the owner of any of the bonds.

Par. 16; Record, p. 17.

It is not shown or claimed anywhere in the bill that the Canton, Aberdeen and Nashville Railroad Company has ever refused to sue, or has ever been in any way requested to sue by the appellant or any one else.

On the contrary, the railroad commission and State revenue agent filed the affidavit of Wirt Adams, the said State revenue agent, to the effect "that the plaintiff, The Illinois Central Railroad Company, owned a majority in number of shares, amount, and value of the capital stock of the Canton, Aberdeen and Nashville Railroad Company at the time said last-named company was organized, and has so owned it ever since, and did at the time the bill was filed in this case and still owns it; and, further, that the majority of the directors of said Canton, Aberdeen and Nashville Railroad Company were directors in said Illinois Central Railroad Company at and before said bill was filed and still are."

Record, p. 33.

The gravamen of the suit is that the said Canton, Aberdeen and Nashville Railroad Company was chartered by the legislature of the State of Mississippi by the act of February 17, 1882, and that by section 8 of its charter it was "exempt from taxation for a term of twenty years from the date of approval of this act," after which the taxes, "whether for

county or State, shall be collected by the treasurer of this State and paid into the State treasury, to be dealt with as the legislature may direct, but said company shall be exempt from taxation by cities and towns," but that the State revenue agent had notified the said railroad commission that said railroad was liable for taxation and delinquent for the years 1886–1897, inclusive, and that said railroad commission had notified appellant and said Canton, Aberdeen and Nashville Railroad Company to appear before it on August 1, 1898, and file a schedule of the property to enable an assessment to be made, and that said railroad commission, "contrary to the rights and protests of your orator, have made such assessment for taxes upon said railroad, and will unless restrained certify the same to said revenue agent, and also to each county and town along the line of said railroad, whose several collectors will seize the property," &c.

Pars. 7, 18, 19; Record, pp. 7, 20, 21.

This is a mistake. Paragraph 18, Record, page 20, attaches a copy of the notice from the railroad commission, and it shows on its face not that they were to file a schedule to enable an assessment to be made simply, but they were notified to appear "and show cause, if any you can, why said railroad should not be assessed," &c., and to enable the railroad commission "to correctly assess said property, if it be liable to taxation, as claimed by said revenue agent."

Record, p. 28.

In paragraph 4, Record, pages 2, 3, the bill cites sections 13 and 20 of article 12 of the constitution of December 1, 1869, the one declaring "the property of all corporations for

pecuniary profits shall be subject to taxation the same as that of individuals," and the other that "taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law," and claims that the supreme court of Mississippi in the case of Mississippi Mills *vs.* Cook, 56 Miss., 40–73, and cases following it, had decided that these provisions of the constitution did not prohibit the legislature from granting exemptions from taxation, but simply from granting irrepealable exemptions—that is, that the words "shall be subject to" did not mean "subjected to," "but that such property shall ever be subject to—*i. e.*, liable to be taxed if the legislature so wills"—and that the charter of the Canton, Aberdeen and Nashville Railroad Company had been accepted and money invested in its building under this construction, but that on June 20, 1898, the said revenue agent, in the case of Wirt Adams, revenue agent, *vs.* Y. & M. V. R. R. Co. *et al.*, had secured an opinion from a majority of the supreme court overruling said former decisions and holding that the words "shall be subject to" in said constitution of 1869 "mean shall be subjected to taxation by each succeeding legislature, leaving no sort of discretion to any legislature in the matter, and those granted by the legislature, whether in charters or otherwise, since 1869 are therefore void *ab initio*."

Pars. 4, 16, and 17; Record, pp. 2, 17–20.

In paragraphs 4, 10, 13, 21, &c., it is expressly admitted that the exemption was repealable; in fact, it is expressly stated that it was "an exemption, however, which both parties to said contract fully understood might be repealed by any

subsequent session of the legislature of said State; but no session of the legislature has seen fit to repeal said exemption."

Par. **26**; Record, pp. 5, 6, 10, 13, 22, **25.**

And it is expressly stated that while the revenue agent act in the Code of 1892 and the act of February 7, 1894, providing that "the revenue agent shall have power to sue for, collect and have assessed, as herein required, delinquent taxes, or taxes that have escaped the assessor and collector back to and including the year 1886," are subsequent laws, yet "that neither of these subsequent statutes affect or impair, nor were they intended by the legislature to impair or affect the exemptions aforesaid as granted in the charter of the Canton, Aberdeen & Nashville Railroad Company, nor any of the many charter exemptions granted by said State at every session of its legislature, theretofore."

Par. 15; Record, pp. 16, 17.

It is claimed that the provision in the charter, *supra*, that after the expiration of the exemption the taxes "shall be collected by the treasurer of this State" is a valid and binding contract, and that said assessment and the attempt of the revenue agent to collect the taxes is a cloud on the title and violates section 10, article 1, and the fourteenth amendment to the Constitution of the United States.

Pars. 7, 11, 12, 19, 20–26; Record, pp. 7, 10–12, 20, 21–26.

It will be noticed that the charter says nothing about the State treasurer collecting any *town* taxes, and the State and

county taxes are only to be so collected after the twenty-year exemption expires.

Par. 7: Record, p. 8.

The prayer of the bill is to enjoin "the defendants, The State Railroad Assessors aforesaid, from approving and the said assessors and the clerk aforesaid from certifying the said assessment for taxes on the Canton, Aberdeen and Nashville railroad for any of the years 1886 to 1897, both inclusive, to the several counties through which said road is located, or any of them, or to any of the cities or towns along said line of railroad," and to enjoin said Wirt Adams, revenue agent as aforesaid, "from beginning, by himself, his attorneys, solicitors or agents, or advising or inciting any of the counties or towns to begin any suit against your orator for the recovery of any judgment or decree for such taxes or for the enforcement of the alleged lien for taxes for any of said years mentioned in this bill, and from taking any proceedings looking to the subjection of the property of your orator or of the railroad known as the Canton, Aberdeen & Nashville railroad to the payment of the taxes so claimed," and that on the final hearing said injunction may be made perpetual, "and that the property of your orator and the said Canton, Aberdeen & Nashville railroad may be adjudged and decreed to be exempt from State and county taxation for the years aforesaid, and that the contract of exemption, as shown by its charter, be declared to be valid and binding both as to the State and counties therein for the term of twenty years from the time of said charter, unless sooner repealed by the legislature of said State; and, also, that it be adjudged to be, under said charter contract,

perpetually exempt from taxation by cities and towns, unless and until the legislature of said State shall repeal said exemption, and that the assessment, made as aforesaid by the said railroad commission, be decreed to be null and void, and the cloud upon the title of your orator aforesaid be removed;" and also to "decree that the provision in its charter as to who shall collect the taxes, whenever in the future they shall be collectible, is a valid and binding contract."

Record, pp. 26, 27.

The sheriffs and tax collectors of the counties and towns were not made parties, and no relief is asked against them. A temporary injunction or restraining order was made and writ issued and served.

The complainant made a motion for a temporary injunction, and said defendants moved to discharge the restraining order and quash the restraining writ, and objected to the granting or issuance of any injunction because:

"1st. They have no authority to distrain or levy on or sell anything for said taxes, and were and are merely performing their duties under the laws of Mississippi, and an injunction against them or any of them, is a suit against the State of Mississippi, and prohibited by the 11th amendment to the Constitution of the United States.

"2d. Said railroad commission in making said assessments act judicially, and cannot be enjoined, and said revenue agent cannot act until after said assessments are made, approved, and sent to the various counties as required by the laws of Mississippi.

"3d. The court has no jurisdiction.

"4th. Said injunction was prematurely applied for.

"5th. Plaintiff has shown no right to file the bill in this case, under the 94th equity rule, or otherwise.

"6th. The plaintiff is not entitled to any injunction on the facts shown in the bill.

"7th. There is no equity on the face of the bill."

Record, pp. 31, 32.

Both motions were heard at the same time, and the court "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged, and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged, and it is further ordered that said motion to grant an injunction is overruled and injunction refused."

Record, pp. 38, 39.

From this interlocutory order an appeal was prayed and granted to the United States circuit court of appeals for the fifth circuit, at New Orleans, which dismissed the appeal, and on May 1, 1899, the said circuit court of the United States for the southern district of Mississippi, on motion of said defendants, dismissed the bill, and from this last decree this appeal is taken.

Record, pp. 40, 43.

The ground of the motion to dismiss the bill was that it was an injunction bill; that the injunction had been refused, and from the decree refusing the injunction an appeal had been taken to said United States circuit court of appeals, which had dismissed the appeal for want of jurisdiction, as shown by a copy of the opinion of said court.

Record, p. 43.

The petition for appeal to this court states that it is asked, under section 5 of the act of March 3, 1891, on the ground of want of jurisdiction.

Record, p. 44.

The judge certifies to the substantial statements of the bill, which is itself before this court, and that one of the grounds of the motion of defendants to discharge the restraining order was that "the court had no jurisdiction to issue the same or to entertain the cause," and that the court made a decree discharging the restraining order and refusing an injunction on February 8, 1899, and on May 1, 1899, dismissed the bill on motion of the defendants, Wirt Adams, State revenue agent, and the said Railroad Commission, and their said clerk, and then certifies to this court, "in conformity with the 5th section of the act of Congress of the year 1891," that the jurisdiction of the court was in issue upon the following three grounds:

Record, pp. 47–49.

"1st. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through the Canton, Aberdeen & Nashville Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal court by making said Canton, Aberdeen & Nashville Railroad Company a defendant in the case.

"2d. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"3d. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi, and in

violation of the eleventh amendment of the Constitution of the United States."

Record, p. 49.

"The appeal is granted solely upon the question of jurisdiction, this court having refused to assume jurisdiction of this cause."

Record, p. 45.

And the assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 44.

The appellee, Wirt Adams, State revenue agent, has made and filed an affidavit, which has been printed and filed and is now referred to as a bar to the further prosecution of this appeal, in which he shows that after the injunction was refused, and before the bill was finally dismissed or an appeal taken to this court, he filed a bill in equity in the chancery court of Clay county, Mississippi, against the said Illinois Central and Canton, Aberdeen and Nashville Railroad Companies to collect the same taxes involved here on the same property, and the taxes of 1898 in addition; that the said defendants in their answer set up the same defenses relied on here, which were overruled by the chancery court and final judgment given against the property as a paramount lien on June 16, 1899, from which decree an appeal is now pending and undetermined in the State supreme court.

POINTS INVOLVED.

There are four main points involved:

1st. Whether this court will sustain an appeal which the record and affidavit of the appellee, The State Revenue Agent, show to be entirely unnecessary.

2d. Whether this court has jurisdiction under the first class or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, under which this appeal is taken.

3d. Whether any Federal question is necessarily involved; and, if so, whether it was not correctly decided by the court below.

4th. Whether it is a suit against the State of Mississippi.

BRIEF.

As we are not familiar enough with the rules of this court to know whether it is entirely proper to refer to briefs in other cases or to make the brief in each case complete within itself, we have made use of a considerable amount of repetition; but if the court desires more light on any one point, they will find that our briefs in each of the cases Nos. 318, 319, and 320 are to some extent different and made to reinforce each other. There are some points of difference and also some points substantially similar in each case.

FIRST POINT.

The affidavit of the State revenue agent shows that after the restraining order was discharged and injunction refused and an appeal to the circuit court of appeals for the fifth circuit dismissed, and before the bill was finally dismissed or this appeal taken, the said revenue agent had instituted a suit in equity in the State chancery court of Clay county, Mississippi, for the collection of the taxes here involved, including in addition the taxes for the year 1898, against both the Illinois Central and Canton, Aberdeen and Nashville Railroad Companies, where the said defendants, after demurrer overruled, filed their answer setting up the pendency of this suit, and also all the defenses attempted to be set up in this case; that said case was set down and tried on bill and answer, when all said defenses were overruled and a final decree rendered in favor of the complainant, from

which decree an appeal was taken and is now pending in the State supreme court.

We freely admit that as a general rule the court which first acquires jurisdiction of a cause is entitled to proceed with it to a final determination; but this rule is subject to certain exceptions, which we have argued in our brief in the case No. 320, now pending here, on a similar motion.

But the point here is that when a pure injunction bill is filed to prevent the State assessing board from completing an assessment and the State revenue agent from bringing suit, and the injunction is refused, and the assessment completed and suit brought on it, and an appeal is taken to this court *without supersedeas*, that the appeal is abortive and improper, for the reason that the very things which the bill was filed to prevent are accomplished facts, and the defendants cannot be injured, because they have an ample and full remedy by writ of error to the supreme court of Mississippi from this court if any Federal question is involved and decided against them by the Mississippi supreme court. Of course, this rule would not apply if the Illinois Central railroad had any right to bring the suit in this case as the sole plaintiff, and that they did not we endeavor to demonstrate hereafter under the next head.

An injunction is a summary and extraordinary process, which rests somewhat on discretion, and should never be granted or continued where there is a plain, adequate remedy at law, and most certainly not where the purpose and object of it have already failed. What would a reversal accomplish? This court cannot force the State revenue agent to discontinue a suit which he has rightfully brought while there was no injunction against him.

But, further than this, a decree has already been rendered in his favor in the chancery court of the State, from which an appeal is now pending in the State supreme court, which can come to this court on writ of error in a proper case, and that decree while unreversed is a bar to the further prosecution of this appeal, although this suit was commenced first.

Oakes *vs.* Mase, 165 U. S., 363, 364.

Stout *vs.* Lye, 103 U. S., 66.

Same case, U. S. Sup. Ct., Lawyers' Co. of Ed., 428, 429.

United States *vs.* Dewey, 25 Fed. Cases, 848, citing—

B'k of U. S. *vs.* Merchants' Bank, 7 Gill (Md.), 415.

Bank of N. A. *vs.* Wheeler, 28 Conn., 433.

McGilvray *vs.* Avery, 30 Vt., 538.

Rogers *vs.* Odell, 39 N. H., 452; and

1 Chitty, Pldg., 454.

See also—

Paine *vs.* Schenectady, 11 R. I., 411.

Memphis, &c., R. R. Co. *vs.* Grayson, 88 Ala., 572.

1st ed. 12 Am. & Eng. Ency. Law, 149 (*c*), par. 8, n. 3 and 4.

Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.

Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.

United States *vs.* Dewey, *supra*, 6 Biss., 501.

And the differences between a judgment or decree and between a writ of error or appeal and between the effect of a final decree or judgment are all abolished in Annotated Code of Mississippi of 1892. Section 31 abolishes between the form and provides that everything must be taken by appeal. Section 594 provides that the decree "shall have the same force, operation and effect of a judgment at law in the circuit court," and section 32 provides that in cases from final decree or judgment the party may have supersedeas, but that "in no case shall such appeal be held to vacate the judgment or decree."

SECOND POINT.

From the foregoing statement it is evident that one of the grounds on which the bill was dismissed was, in its essence, non-Federal. The judgment of the circuit court refusing the injunction was expressly based on two findings:

1st. That "the plaintiff had shown no right to invoke the jurisdiction of this court."

2d. That "this court has no jurisdiction."

Now, when a motion to dismiss the bill was afterwards made, and no leave was asked to amend the bill, and the ground of the motion was because the injunction had been refused, and the motion was sustained and bill dismissed without more, it necessarily follows that the dismissal was on the same grounds on which the injunction was refused.

The first finding in the decree refusing the injunction was clearly in response to the evidence under the fifth ground of the motion, that "plaintiff has shown no right to file the bill in this case under the ninety-fourth equity rule or otherwise."

This in turn was based chiefly on the undisputed affidavit of Wirt Adams, that the plaintiff, The Illinois Central Railroad Company, had a majority of the directors and owned a majority of the shares in the capital stock of the defendant, The Canton, Aberdeen and Nashville Railroad Company, showing that there was no cause nor necessity for making The Canton, Aberdeen and Nashville Railroad Company a defendant, and thus seeking to commit a fraud on the jurisdiction and gain access to the Federal court as a non-resident.

The motion to discharge the restraining order and refuse the injunction was that the plaintiff had shown no right to file the bill under the ninety-fourth equity rule *or otherwise*. The ninety-fourth equity rule makes very stringent regulations to prevent parties with only derivative rights from getting into the Federal court on a claim of non-residence; but the motion was not confined to this rule. It said under the ninety-fourth equity rule *or otherwise*, and it is clear that in this case it was not necessary to go so far as to stand alone on the rule, for the attempt in this case violates the general equity rule, that a stockholder cannot sue to protect the charter or corporate rights until he has requested the corporation to sue and they have refused, and that could not be shown in this case, because the undisputed affidavit of Wirt Adams shows that the plaintiff, The Illinois Central Railroad Company, owned a majority of the shares of capital stock and had a majority of the directors of the defendant, The Canton, Aberdeen and Nashville Railroad Company.

Hawes *vs.* Oakland, 104 U. S., 450.
Taylor *vs.* Holmes, 127 U. S., 489.
Mount *vs.* Radford, 93 Va., 430, 431.
Ware *vs.* Bazeman, 58 Ga., 340.
Warren *vs.* Shoe Co., 166 Mass., 97.
Decatur *vs.* Palm, 113 Ala., 531.

And generally see—

4 Thompson Comm. Law Corp., § 4476–4480.

They sue also as a creditor. They cannot do that until they have reduced their claims to judgment.

Van Weel *vs.* Winston, 115 U. S., 245, 246.
Cates *vs.* Allen, 149 U. S., 451.
May's U. S. Sup. Ct. Prac., p. 552.

They also attempt to sue as a bondholder, but their bill shows that there were at first $2,000,000 of bonds, and that for certain financial reasons another mortgage was executed and bonds issued under it to the amount of $1,750,000, which were sold, and the amount of the prior $2,000,000 issue paid off, and that for the balance of $250,000 a note was taken, but the bill does not show what part of said $1,750,000 the Illinois Central railroad owned or that it really owned any of them at the time of filing the bill, and they do not make the trustee of the mortgage a party, or even tell who or what he or it is, or whether it or he is a non-resident. The rule about this, as stated, is that the relation is analogous to that of a stockholder to the corporation, and that a bondholder is not authorized to institute or prosecute suits for the safety or security of the trust estate until he has requested the trustee to sue.

Coal Co. *vs.* Blatchford, 11 Wall., 172, 177.
Stevens *vs.* Eldridge, 4 Cliff., 348.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Owens *vs.* Ohio, &c., R. R. Co., 20 Fed. R., 12, 13.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Ritchter *vs.* Jerome, 123 U. S., 246–248.
(4th ed.) 2 Perry on Trusts, § 885, 886, citing—
Reade *vs.* Sparkes, 1 Moll., 8.
Hughes *vs.* Key, 20 Beav., 395.

See also—

City of Atlanta *vs.* Grant, 57 Ga., 340.
5 Thompson Comm. Law Corp., § 6126, 6209, 6210.
Van Weel *vs.* Winston, 115 U. S., 245.

Equity will not grant relief to one who seeks relief independently and derivatively through the rights of others, who are themselves not asking relief or who are not made coparties.

(3d ed.) 2 High on Inj., § 1547, citing—

Roberts *vs.* Bozon, 3 L. J. Ch., 113.

Bagg *vs.* Detroit, 5 Mich., 336.

If the trustee refuses on request to sue, then the suit may be brought by one or more, but it must be brought *on behalf of all*, for equity will not undertake to settle such matters by piecemeal, and the object and ground of equity jurisdiction is to prevent a multiplicity of suits, which could not be done if each were permitted to sue separately.

Wood *vs.* Draper, 24 Barb., 187.

Williams *vs.* County Court, 26 W. Va., 488.

Packard *vs.* B'd County Com., 2 Colo., 338.

(3d ed.) 2 High on Inj., § 1560.

And in all cases the trustee or corporation representing the interests of all and to bind all is an indispensable party.

Winslow *vs.* Minn., &c., R. R. Co., 4 Minn., 316.

Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.

Morgan *vs.* Kans. Pac. R. R., 15 Fed. R., 56, 57.

2 Pomeroy Rem. & Rem. Rights, §§ 356, 357.

5 Thompson Comm. Law Corp., § 6210 & n. 4 & 5.

Carey *vs.* Brown, 92 U. S., 171, 172.

McArthur *vs.* Scott, 113 U. S., 340.

Ritchter *vs.* Jerome, 123 U. S., 246.

Bealls *vs.* Ills., Mo. & Tex. R. R. Co., 133 U. S., 290.

May's U. S. Sup. Ct. Prac., p. 552.

The same rule applies as between lessee and lessor.

Bellaire *vs.* Balt., &c., 146 U. S., 117, 119.

Chicago *vs.* Crane, 113 U. S., 432–435.

Swann *vs.* Frank, 148 U. S., 610, 611.

Horton *vs.* Wallace, 23 C. C. A., 71.

Same case, 66 Fed. R., 409, and 77 Fed. R., 61.

The Illinois Central Railroad Company had a majority of the directors and a majority of the stock of the Canton, Aberdeen and Nashville Railroad Company, and they could not place themselves on opposite sides of the docket, for they are one and the same thing.

South Springs *vs.* Amador, 145 U. S., 301.

May's U. S. Sup. Ct. Prac., p. 45.

Merritt *vs.* Bowdoin College, 169 U. S., 556.

This was shown by the affidavit of Wirt Adams, which was not objected to, and, if it had been, was competent evidence, as has been abundantly settled.

(3d ed.) 2 High on Inj., §§ 1577, 1578.

Indeed, it seems to be a universal rule that where a party acts collusively or attempts to commit a fraud on the jurisdiction, it may be shown either by the record or *by extrinsic evidence*, or even by an *amicus curiæ*.

Kimball *vs.* Kimball, 174 U. S., 160–162.

Lake Co. *vs.* Dudley, 173 U. S., 251–254.

For a general collection of cases, see—

2nd Ency. Pldg. & Prac., pp. 341–344, and n. 1, 2, and 3, p. 344.

The State of Mississippi has no independent contract with the Illinois Central Railroad Company. Every right in which it claims as creditor, bondholder, or lessee comes entirely and exclusively through the charter of the Canton, Aberdeen and Nashville Railroad Company, and it can claim no higher or greater rights than are contained in that charter or than could be claimed by the Canton, Aberdeen and Nashville Railroad Company itself. The State has a right to collect its taxes, and if the incidental effect is to impair a lease or bonds or any other contract to which it was not a party, that is no defense.

In re Ayers, 123 U. S., 496.
Ritchter *vs.* Jerome, 123 U. S., 248.
Morley *vs.* Lake Shore, &c., 146 U. S., 162.
Schurz *vs.* Cook, 148 U. S., 397.
Peterson *vs.* Kittridge, 65 Miss., 39.
Roberts *vs.* Bozon, 3 L. J. Ch., 113.
Bagg *vs.* Detroit, 5 Mich., 336.
(3rd ed.) 2 High on Inj., § 1547.

Indeed, Mr. Justice White goes to the heart of the thing when he says there can be no irrepealable contract right when there is no irrepealable contract.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

Hence, we say, in the language of the fifth ground of the motion to discharge the restraining order and refuse the injunction, that "the plaintiff has shown no right to file the bill in this case under the ninety-fourth equity rule or otherwise," and in the language of the first finding in the order

refusing the injunction, "that the complainant has shown no right to invoke the jurisdiction of the court."

So the first ground of the order and the first certified ground is plainly a decision based on general principles of law, and we ask a dismissal of the appeal, because this court has decided that to sustain such an appeal the question of the jurisdiction must be to the jurisdiction of the circuit court as a Federal court, and not on grounds equally applicable to all courts of equity.

Blythe *vs.* Hinckly, 173 U. S., 501.
Third Street, &c., *vs.* Lewis, 173 U. S., 457, 460.
No. 256, Blythe Co. *vs.* Blythe, 172 U. S., 644.
Smith *vs.* McKay, 161 U. S., 357, 358.

And the decision as to the jurisdiction of the court *as a Federal court* must be the *controlling part* of the decision.

Carey *vs.* Houston, 150 U. S., 170, 181.

And not only was the decision that the plaintiff had shown no right to invoke the jurisdiction of the court not based on the jurisdiction of the court as a Federal court as the *controlling* factor, but that was really not necessarily embraced in the decision at all.

This court has held, on the contrary, that a decision as to who is the proper party to bring a suit does not even raise a Federal question, although a Federal question may be involved in the merits if brought by the right party.

Montgomery *vs.* Hernandez, 12 Wheat., 129.
Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

And as the parties have deliberately brought the suit in the manner they did, and to commit a fraud on the jurisdiction, it should have been dismissed; but it is immaterial here whether the decision of the circuit court was right or wrong. It did decide that the plaintiff had shown no right to invoke the jurisdiction of the court under the ninety-fourth equity rule *or otherwise*, and the certificate of the judge shows that the exact point was that the Illinois Central Railroad Company had no right to raise jurisdiction in the Federal court by making The Canton, Aberdeen and Nashville Railroad Company a defendant. While in this particular instance it prevented the plaintiff from suing in the Federal court, it was not because it was a Federal court, but on a principle applicable alike to all courts, and hence this court has no jurisdiction under that clause of section 5 of the judiciary act of March 3, 1891, under which the appeal was taken and cause certified, and it should be dismissed.

And to show that the Illinois Central Railroad Company and Canton, Aberdeen and Nashville Railroad Company have never considered themselves as on opposite sides of the docket, the attorney for the Illinois Central Railroad Company also waives all notices, &c., and even the citation to this court, as the attorney for the other company.

Record, pp. 42, 46.

And further, to show they had no confidence in the jurisdiction by reason alone of non-residence of the Illinois Central Railroad Company, as sole plaintiff, in the jurisdiction-alone paragraph of the bill they simply aver that the

"taxes amount to a large sum, much more than $20,000, to wit, the sum of — dollars."

Par. 19; Record, pp. 20, 21.

Which does not show that the jurisdictional amount of $2,000 would be due to the State or any of the counties or towns, and the bill would have been properly dismissed for this reason alone.

Citizens' Bank *vs.* Cannon, 164 U. S., 321, 322.
Fishback *vs.* W. U. Tel. Co., 161 U. S., 99–101.

And further still, as we understood it, one of the main grounds on which the circuit court decided that the plaintiff had shown no right to invoke the jurisdiction of the court was that this same Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company had voluntarily filed a bill in the State court to enjoin a similar assessment, and that the Illinois Central Railroad Company was bound by that decision and could come into the Federal court to relitigate the same question.

R. R. Co. *vs.* Adams, 73 Miss., 662, 663.
Forsyth *vs.* Hammond, 166 U. S., 517, 518.
Rosenthal *vs.* Coates, 148 U. S., 147, 148.
French *vs.* Hay, 22 Wall., 238.

THIRD POINT.

The Question of Jurisdiction as a Federal Court.

This is raised by the second certified ground, which was in substance as follows:

(A.)

That the Bill Set Forth No Proper Federal Question.

If this court can tolerate the kind of collusion attempted to be practiced here, and place both the Illinois Central and the Canton, Aberdeen and Nashville Railroad Company on the same side of the docket as plaintiffs, where they have not placed themselves nor asked this court to place them, then the jurisdiction would depend on whether the circuit court had any jurisdiction as a Federal court. We protest against this, and that the court should leave the parties where they have deliberately placed themselves; but if the court should differ with us on this point, then we present the following argument on the other points:

(A 1).

That the Bill Raises No Proper Federal Question.

This court has decided that two things must co-exist to give this court jurisdiction: First, that there must be a Federal question involved in the case; and, second, that it must be raised at the proper time and in the appropriate way.

The plaintiff has raised some sort of a question at the proper time and in the appropriate way, if it can be raised at that time and in that way; but the point which overshadows all others is, is it a Federal question?

A Federal question cannot be created or manufactured to order, but must exist. We do not mean that it ought to be decided one way or the other, for then it would cease to be a Federal question or any other kind of a question. It must be such a question as could be held to raise a fair and reasonable ground of contention between fair and reasonable men, a question in and about which there can be said to exist a fair and reasonable dispute, or, as the court generally puts it, a question about which there is *bona fide* color for dispute or difference of opinion, where there is no real diversity of citizenship.

McCain *vs.* Des Moines, 174 U. S., 169, 170, 181.
St. Joseph *vs.* Steele, 167 U. S., 662.
Clark *vs.* McDade, 165 U. S., 172.
Wilson *vs.* North Carolina, 169 U. S., 595.
Hamblin *vs.* Western, &c., 147 U. S., 531.
N. O. *vs.* N. O. Water Works Co., 142 U. S., 79, 87.
Millingar *vs.* Hartupee, 6 Wall., 258.

It is evident that the parties themselves did not believe there was any *bona fide* claim of a Federal question involved in the case, for they sought to get into the Federal court on the collusive claim of non-residence.

The exemption is expressly admitted all through the bill to be repealable and never repealed, and the gist of it all is that after making certain decisions and establishing a *stare*

decisis the Supreme Court has overruled its former decisions and held the exemption granted in 1882 to be unconstitutional under an antecedent constitution of December 1, 1869—a case of *stare decisis* pure and simple. This court has so often and so uniformly decided that this presents no Federal question, that this suit should not be retained for further argument. The true theory of the bill is not a Federal question, but non-residence and *stare decisis*.

Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
Hansford *vs.* Davis, 163 U. S., 278, 279.
Turner *vs.* Wilkes County, 173 U. S., 461.
Winona *vs.* Minn., 159 U. S., 528, 529.
Wood *vs.* Brady, 150 U. S., 20–23.
Huntington *vs.* Attrill, 146 U. S., 684.
N. O. *vs.* N. O. Wat. W'ks., 142 U. S., 87, 88.
Brown *vs.* Smart, 145 U. S., 454, 458.
St. Paul *vs.* Todd, 142 U. S., 286, 287.
N. O. Wat. W'ks *vs.* La. Sug. Co., 125 U. S., 18, 30.
Lehigh *vs.* Easton, 121 U. S., 388, 392.
N. J. C. R. R. Co. *vs.* Mills, 113 U. S., 256, 257.
Boyd *vs.* Ala., 94 U. S., 645.
R. R. Tax Cases, 92 U. S., 575.
R. R. Co. *vs.* Brick, 4 Wall., 177.

We have cited this large number of cases, not because it is necessary to show this court what the law is, but to show the court that this case comes directly under the rule laid down by it, that where there is color for the motion, and the

contention of appellant has often been determined adversely, the motion to affirm should be granted.

Sire *vs.* Ellithorpe, 137 U. S., 579.
St. Louis *vs.* Montana, 171 U. S., 650.
The S. C. Tryon, 105 U. S., 267.
Hinkley *vs.* Morton, 103 U. S., 764.

(A 2.)

The revenue agent act of February 7, 1894, and code provisions under which it is claimed, in paragraph 15 of the bill, that the proceedings are being conducted by the revenue agent, are as follows:

"*Act of February 7th*, 1894, *Laws of* 1894, *pp.* 29–31.

"CHAPTER 34.

"AN ACT to provide for the election of a State revenue agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4191, 4192, 4193, and 4195, in chapter 126 of the Annotated Code of Mississippi.

"SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That there shall be elected a State revenue agent, who shall be elected at the general election in 1895 in the same manner that other State officers are elected, and whose term of office shall be four years, and until his successor is elected and qualified. The present incumbent shall hold office for the term of his appointment, and until his successor is elected and qualified.

"SEC. 2. The State revenue agent may appoint a sufficient number of deputies. He shall have power, and it shall be his duty to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies

and associations of persons for all past-due and unpaid taxes of any kind whatever, for all penalties or forfeitures, for all past-due obligations and indebtedness of any character whatever owing to the State or any county, municipality or levee board, and for damages growing out of the violation of any contract with the State or any county, municipality or levee board. He shall have a right of action and may sue at law or in equity in all cases where the State or any county, municipality or levee board has the right of action or may sue. It is the duty of the State revenue agent to investigate the books, accounts and vouchers of all fiscal officers of the State, and of every county, municipality and levee board, and to sue for, collect and pay over all money improperly withheld from either, and he has the power to sue and right of action against all such officers and their sureties to collect any such moneys; but if the delinquency appear by a correct open account on the books of the proper accounting officer, the right of the revenue agent to sue shall arise only after he has given thirty days' notice to the delinquent officer to pay over the amounts and he has failed to do so.

"SEC. 3. After the expiration of the fiscal year in which taxes become due, should the revenue agent discover that any person, corporation, property, business, occupation or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall within ten days thereafter make the proper assessment by way of an additional assessment on the tax-rolls or tax-list in his hands, and give ten days' notice in writing to the person or corporation whose property is assessed, and all objections to such assessment shall be heard at the next meeting of the board of supervisors of counties or board and mayor of aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of such assessment and the State revenue agent may appear at said meeting, and an appeal to the circuit court may be taken

from the order of the board approving or disapproving such assessment, by either party. If the assessment should be approved and no appeal be taken, and the taxes not paid within thirty days thereafter, the property if it be real estate, shall be ordered sold as provided by section 3850 of the Annotated Code of Mississippi, and if it be personalty the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make the assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment-rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped taxation, he shall give the required notice to the assessor, who shall make the proper assessment, and give the required notices to the owner of the property, and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments as herein required, the revenue agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections.

"SEC. 4. If the property which the revenue agent discovers to have escaped taxation shall belong to any railroad or other corporation, which, under the law, is required to be assessed by the State railroad assessors, the revenue agent shall give the notice required herein to said State railroad assessors, and they shall give the required notice to the company or corporation. At their next meeting after giving the proper notice, the said property shall be assessed in the same manner required by law, and placed on the proper county, municipal or levee board roll, and collected by the proper officers required by law, and the revenue agent shall have his compensation as in other cases.

"SEC. 5. The revenue agent in the discharge of his official duties shall have full power and authority to examine and

investigate the books, records, papers, accounts and vouchers of any State, county, municipal or other officer.

"SEC. 6. The revenue agent shall have power to sue for, collect, and have assessed as herein required, delinquent taxes, or taxes that have escaped the assessor and collector back to and including the year 1886, and no further.

"SEC. 7. That sections 4187, 4190, 4191, 4192, 4193 and 4195 in chapter 126 of the Annotated Code of Mississippi, be and the same are hereby repealed.

"SEC. 8. That this act shall take effect and be in force from and after its passage.

"Approved February 7, 1894."

The only three sections material to this controversy left unrepealed in said chapter 126 of the Annotated Code of Mississippi of 1892 are as follows:

"4194. Suits by.—All suits by the State revenue agent shall be in his own name for the use of the State, county, municipality, or levee board interested; and he shall not be liable for costs, and may appeal without bond. Such suits may be tried at the return term, and shall take precedence of other suits.

"4200. In all suits against delinquent tax-payers, the assessor and tax collector shall be made parties; and if it shall appear that the failure of the tax-payer to pay his taxes was caused by any willful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent."

Under section 4199, "neither the State, nor any county, municipality, or levee board shall be chargeable with any fees or expenses," and the full compensation of the revenue agent is fixed at "twenty per centum of all amounts collected and paid over by him."

It is evident that these provisions are very different from the special act of April 3, 1888 (chapter 28, Laws of Mississippi, 1888, page 49), referred to by this court in the case of The Yazoo and Mississippi Valley Railroad Company *vs.* Thomas, 132 U. S., 181. In that case there was a special act for back taxes on railroads alone, and it had no future application, but only applied to delinquent railroads which did not pay up within sixty days after its passage, and had no provision for suit by the revenue agent or any one else, but the tax collectors were required to collect by sale or distress. (See section 5, Laws 1888, page 51.) On the contrary, the laws just quoted are general, applying alike to individuals, corporations, and officers and all kinds of taxes, obligations, and defalcations, past, present, and future, and intended to be a part of the permanent general code of laws of the State, for this act of 1894 is an amendment and partial substitute for chapter 126 of the Annotated Code of 1892.

These provisions do not provide for any summary remedies by sale or distress by the revenue agent, but for a regular assessment on actual notice in writing and after all objections are heard and disposed of by a competent tribunal, with a right to certiorari under section 90 of said code, and the revenue agent cannot act summarily or seize or sell anything, but under section 2 of said act of 1894, *supra*, he must bring suit "in the proper court."

Hence this law can in no proper sense be held to be a subsequent law impairing the obligation of contracts, but only as a law providing a regular, orderly method to determine whether property is liable to taxation when that question is in dispute. It is nothing more than if the legislature had passed a law that wherever the liability of property to

taxation is disputed the revenue agent should bring a suit against the proper owner "*in the proper court*" to settle the question, and it is inconceivable how that could be held to be impairing, or having any tendency to impair, the contract by subsequent legislation.

And this court expresses grave doubts whether any Federal question can be raised under such general legislation. It says, speaking through Mr. Justice Brewer:

"The act of 1881 is one making general provision for putting upon the tax-roll all lands that have escaped taxation in prior years. Of the validity of a statute of that character, that is, one providing generally for subjecting to taxation lands that have improperly escaped taxation in prior years, there can be no serious doubt, so that the real contention is that the taxing officers applied this valid statute to lands which ought not to have been subjected to its operation by reason of a prior contract between the State and its grantee. Does this bring the case within the constitutional inhibition against a State's passing a law impairing the obligation of a contract?

Railroad Company *vs.* Rock, 4 Wall., 177.
St. Paul & C. Railway *vs.* Todd County, 142 U. S., 282.
Mobile & Ohio Railroad *vs.* Tennessee, 153 U. S., 486.
Central Land Company *vs.* Laidley, 159 U. S., 103.

"Assuming, but not deciding, that this law of 1881, enacted subsequently to the contract created by the acts of 1857 and 1862, as practically applied by the State officers to the taxation of these lands, presents the question of a violation of the constitutional inhibition, and the contention of the plaintiff is that it does, and that question was distinctly presented to the State court, and by it decided—we are of

opinion that the judgment of the court was correct, and that it must be affirmed."

Winona, &c., *vs.* Minnesota, 159 U. S., 529.

In that case there was another ground, that the act of 1881 was unconstitutional in failing to provide proper notice to the owners of the property sought to be assessed and taxed.

Ib., pp. 527, 528.

And, as the court put it, this presented the question, "Were the tax proceedings in violation of that clause of the fourteenth amendment which prohibits a State from depriving any person of property without due process of law"?

Ib., p. 528.

And the court took jurisdiction on this ground, and this is the ground argued in the opinion; and while the said act of 1881 does not provide for notice specifically, the court review all the statutes and hold that on a fair construction of this act, together with those *in pari materia*, provision is made for notice, and that it had also been so construed by the State court, and they affirm the judgment.

Ib., 533–539.

See also—

Pittsburg *vs.* Backus, 154 U. S., 425, 426.

In the case at bar the State supreme court have expressly said that the alleged delinquent is entitled to notice and to make defense.

Yazoo & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

But that is not material, as the statute itself expressly provides for notice, and the parties here had notice. No point is made on that and no such question is raised or before this court. We have argued the point that the repeal of or a decision that a confessedly repealable exemption is unconstitutional raises no Federal question, and we here and now insist, under the reasoning, *supra*, of Mr. Justice Brewer, that even if the repealability of the exemption was denied and was fairly in dispute, it cannot be made a Federal question under such general laws as those above quoted.

(A 3.)

There are two points in the bill by which it is sought to raise a Federal question. These are the long arguments about the action and acquiescence of the State officials and all departments of the State government. This would come under the ordinary doctrines of laches and estoppel *in pais*, neither of which apply to the State or raise any Federal question, and besides the decision of the State court is in accordance with the decisions of this court.

Pierce *vs.* Somerset Railway Co., 171 U. S., 641, 648.

United States *vs.* Kirkpatrick, 9 Wheat., 720.

Hansford *vs.* Davis, 163 U. S., 278.

Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.

Yazoo, &c., *vs.* Thomas, 132 U. S., 185.

United States *vs.* Tanner, 147 U. S., 661.

State *vs.* Brewer, 64 Ala., 287.

Perry Co. *vs.* Selma, 65 Ala., 391.

Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.

Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases cited.

2 Thompson, Comm. on Law of Corp., § 2825.

(A 4.)

There is nothing in the contention that the charter gives a vested right to the State treasurer to collect the taxes to the exclusion of the revenue agent. This would be no reason for enjoining the assessment, and thus escaping the payment of the taxes altogether, either to the State treasurer or any one else. If the exemption is unconstitutional this provision falls with it, for it is claimed by the plaintiff itself that it is a necessary and material part of the eighth section of the charter under which they claim the exemption, and if this section was valid the State treasurer could not collect the taxes until the year 1902, twenty years after the date of the charter in 1882, and it has no application to the taxes before then nor to the municipal taxes at any time.

It was a mere method of collecting the taxes, and no one can have a vested right in the method of assessing or collecting its taxes by the State.

Dailey *vs.* Swope, 47 Miss., 389, 390.
Winona, &c., *vs.* Minnesota, 159 U. S., 538.
St. Joseph *vs.* Steele, 167 U. S., 662.
L. & N. R. R. Co. *vs.* Louisville, 166 U. S., 714.

But the conclusive answer to such a contention, whether the contention itself is well founded or not, is that it is purely a legal defense, which can be set up to any suit brought by the revenue agent, and furnishes no ground whatever for equitable relief or of equity jurisdiction. Equity can have no jurisdiction to enjoin the revenue agent from bringing a suit on a ground which would be a full defense to the suit

when brought. The statute itself does not specify who shall collect the taxes. It says they shall be collected "by the proper officers."

Laws of 1894, pp. 30, 31, § 4.

Hence if the suit should be brought by the revenue agent, when the State treasurer was "the proper officer," that would be a perfect legal defense, and equity has no jurisdiction of such a case or such a supposition.

The question of who is the proper officer to bring a suit raises no Federal question.

Montgomery *vs.* Hernandez, 12 Wheat., 129.

Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

(A 5.)

Another remarkable reason for sustaining this bill is the statement at the end of paragraph 25, Record, page 24, that if this assessment is permitted, then the exemption will be annulled by section 112 of the constitution of November 1, 1890, which provides that if any assessment is made the counties shall not be denied the right to levy taxes on it. They admit that the exemption is repealable and yet ask this court to not let it be repealed by the constitution of the State. For said section 112 see Annotated Code of 1892, pages 59, 60.

And as to the towns, section 606 of the Revised Code of 1880 provides that they may tax railroads, and this is preserved in section 607 and re-enacted in the laws of 1884, section 1, pages 29, 30.

And as the State supreme court has expressly decided that all exemptions were repealed by the laws of 1884, 1886, 1890, and Code of 1892, there can be no pretence of a Federal question, it being expressly admitted that this exemption was repealable, and the only contention being that it never has been repealed. That all exemptions were repealed, see Opinions of November 22, 1898, and February, 1899, in case No. 244, pages 671, 672, and 686, 687.

FOURTH POINT.

(B 1.)

That it is a Suit against the State.

The statute provides that "all suits by the State revenue agent shall be in his own name for the use of the State, county, municipality, or levee board interested, and he shall not be liable for costs and may appeal without bond."

Annotated Code of 1892, § 4194.

"He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue."

Laws of 1894, p. 29, § 2.

In a similar case, this court has held that an injunction was a suit against the State and could not be maintained, but was prohibited by the eleventh amendment to the Constitution of the United States, which provides that the "judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one

of the United States by citizens of another State, or by citizens or subjects of any foreign State," and that whether it was a suit against the State was to be determined by its object and scope and not by the nominal parties to the record. That was an injunction case very similar to this one in respect to the revenue agent.

In re Ayers, 123 U. S., 443.

The court say that if any Federal question should arise in the progress of the suit, it would ultimately reach this court on a writ of error, and any wrong could be corrected in that manner, but that a suit could not be enjoined on the assumption that the State court will decide erroneously.

Ib., pp. 494, 495.

"A bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must necessarily be a suit against the State. In such case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

Ib., pp. 502, 503.

And the distinction is clearly pointed out between this class of cases and that class where persons under color of State authority and performing ministerial duties seek to disturb others in the possession of their property.

Ib., pp. 504–507.

And this case is affirmed in—

Hans *vs.* Louisiana, 134 U. S., 10.

And again in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And again as late as—

Tindall *vs.* Wesley, 167 U. S., 219, 220.

Where it is said the test is whether the State would be bound by the judgment, as it clearly would be here.

Ib., 223, 224.

And, on general principles, equity will not enjoin a tax collector from bringing suit.

Archer *vs.* Terre Haute, &c., 102 Ill., 493.

So that if the State revenue agent was an improper party to the suit and could not be enjoined, and the plaintiff failed to ask for leave to amend and dismiss as to him, it was right and proper to dismiss the bill. The court will not undertake to carry on a suit with and against improper parties.

(3d ed.) 2 High on Inj., § 1613, citing—

Hudson *vs.* Maddison, 12 Sim., 416.

Jones *vs.* Garcia, &c., Turn. & R., 297.

This case of *In re* Ayers is also approved and applied by this court in—

Fitts *vs.* McGhee, 172 U. S., 524–528.

Harkrader *vs.* Wadley, 172 U. S., 169, 170.

(B 2.)

The same reasoning applies to the railroad commission.

But there is also another ground which applies to them. It is the second ground of the motion, that they act *judicially* and cannot be enjoined.

Section 720 of the Revised Statutes prohibits an injunction against proceedings in a State court.

The proceedings before the railroad commission are *judicial proceedings*, on notice, and with an opportunity to be heard, to determine whether the property is liable to taxation and whether it has escaped taxation.

It is expressly decided that they cannot be enjoined in the State court on a statute much broader than the common-law doctrine against injunctions in tax matters.

Y. & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And in a later decision still it is decided that the railroad commission act judicially, and that if they commit any error it can be corrected by a certiorari to the circuit court under section 90 of the Annotated Code of 1892, and only in that way.

Y. & M. V. R. R. Co. *vs.* Adams, No. 9358, decided March 27, 1899, 76 Miss.

And this court has decided that the supreme court of a State has a right to construe its own laws, and where it decides that a party improperly assessed for taxes has a remedy by certiorari, and that this is his exclusive remedy, it raises no Federal question.

Yesley *vs.* Washington, 146 U. S., 646, 657.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

That the railroad commission, in this class of cases, exercise the functions of a court and act judicially, see also—

Louisville Water Co. *vs.* C ark, 94 Ky., 47.
Cooley on Taxation, p. 749, n.
Youngston *vs.* Bradley, 64 Fed. R., 441.
New Orleans *vs.* Paine, 147 U. S., 261.
And other cases cited in the opinion in said case No. 9358.
Stanley *vs.* Supervisors, 121 U. S., 535, 550.
Williams *vs.* Supervisors, 122 U. S., 154.
Palmer *vs.* McMahon, 135 U. S., 665.
Boston *vs.* Park, 19 Am. Dec., 332.
State *vs.* Springer, 134 Mo., 212.
Railway Co. *vs.* Backus, 133 Ind., 513.
Throop on Public Officers, § 541 and cases.

Hence we ask that this appeal be dismissed or that the decree of the court below be affirmed.

R. C. BECKETT,
Attorney for Motions.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Nos. 318, 319, and 320.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*; THE CANTON, ABERDEEN AND NASHVILLE RAILROAD COMPANY, ET AL., *Appellees.*

and—

SAME
vs.
WIRT ADAMS, *State Revenue Agent*; THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., *Appellees.*

and—

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF.

Our excuse for filing a joint brief is that there are many points substantially alike or similar in the three cases, and we think this course will save the court both time and labor.

Of these three suits, the first two are to enjoin the making of assessments for and suits to collect the taxes, and the last one is to enjoin any distraint for or suit for collection of the taxes on an assessment already made.

The first two are filed by the Illinois Central Railroad Company, a foreign corporation, as sole plaintiff, claiming a right in the first case to file the bill as lessee and as a creditor and bondholder of the Canton, Aberdeen and Nashville Railroad Company, which is made a defendant as owner of the road and lessor.

The undisputed affidavit of the appellee, Wirt Adams, introduced on the hearing of the motions for an injunction on the one side and to discharge the restraining order on the other, shows that a majority of the directors in said Canton, Aberdeen and Nashville Railroad Company were also directors in said plaintiff company, and that a majority of its stock was also owned by said last-mentioned company (Record in No. 318, p. 33).

In the second case the right to file the bill is claimed as a bondholder and creditor of the Yazoo and Mississippi Valley Railroad Company and as the owner of the Mississippi Valley Company, a domestic corporation, which owned a majority of the stock of said Yazoo and Mississippi Valley Railroad Company, and said last-named company is made a defendant (our brief in No. 319, pp. 5, 6). In neither case is there any pretense of a request to the railroad companies owning the property and made defendants to sue. The said Mississippi Valley Company is not made a party. The trustees of the mortgages are not made parties. The unsecured claims are not reduced to judgment, and the suits are brought by a single bondholder, and are not on behalf of the plaintiff and the other bondholders.

These points are argued in our separate briefs on the motions to dismiss or affirm in Nos. 318 and 319, on pages 19–25 and 20–27 respectively. Counsel for appellants, recognizing the force of this, seek to escape the dilemma by asking

this court to treat these cases as not involving diversity of citizenship, but a Federal question, and to arrange the parties on the proper side of the docket. We will show hereafter why this cannot be done.

The third suit is filed by the Yazoo and Mississippi Valley Railroad Company, a domestic corporation, the owner and the proper plaintiff, showing that there was no excuse nor necessity for the Illinois Central Railroad Company filing the previous bill, and both suits were heard together by consent (Record in No. 320, p. 20).

The first two suits pertain to *back taxes*, the one to taxes of the years 1886–1897, and the other to taxes of the years 1886–1891. The third suit has reference alone to *current* taxes of the year 1898.

So it will be seen that one question embraced in the first two suits and certified to this court, that of non-residence, was eliminated from the last, which must stand, if at all, on the presence of a Federal question.

There was also another question, which was peculiar to the first two suits. They were primarily to enjoin the railroad commission, acting as State railroad assessors, from proceeding to finish making an assessment which they had already begun. It had been expressly decided by the supreme court of Mississippi that this could not be done.

Y. & M. V. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And this court had expressly decided that such a decision raised no Federal question.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

It is true the right to file the bill in the above case of R. R. Co. *vs.* Adams was claimed to be conferred by the statute, and it may be contended that the State statutes do not apply in the equity practice in the United States courts, but by reference to that case it will be seen that the real contention was that the statute *enlarged* the equity rule, and

that neither the railroads nor the court considered that such a bill would lie under the general equity rules and practice.

We have argued this point in our separate briefs, on pages 36 and 43 in No. 318 and pages 19, 20, and 32–34 in No. 319.

We wish here to call the attention of the court particularly to the fact that in the above suit of R. R. Co. *vs.* Adams, 73 Miss., 648, the bill was filed by the two plaintiffs in these suits, The Illinois Central and Yazoo and Mississippi Valley Railroad Companies. They chose their own forum and voluntarily filed that bill in the State court, and this court and the lower Federal courts have often held that a party will not be permitted to experiment in any such manner, and that when he has *voluntarily* gone into the State courts and met an adverse decision there he will not be permitted to transfer his litigation to the Federal courts and relitigate the same questions. Instructive cases on this point are:

Forsyth *vs.* Hammond, 166 U. S., 517, 518.
Rosenthal *vs.* Coates, 148 U. S., 147, 148.
French *vs.* Hay, 22 Wall., 238.
See our separate brief in No. 320, pages 33, 34, and Blythe *vs.* Hinkley, 173 U. S., 507, 508.
See also opinion of supreme court of Mississippi, No. 9358, pamphlet copy on file in No. 319 here.

In their brief in opposition to our motion to dismiss or affirm in No. 320, on page 13, opposite counsel scout the idea that the decision of the railroad commission could be judicial, and therefore *res adjudicata*, but this is exactly what the supreme court of Mississippi has decided, and that in the second appeal of these *same parties*, in No. 9358 in the supreme court of Mississippi, which was a continuation of the *same litigation* in R. R. Co. *vs.* Adams, 73 Miss., 648, as is apparent from the inspection of the opinion in said No. 9358, a copy of which is on file in No. 319 here.

For fear that the attorneys for these railroad companies

may again escape and run at large in the green pastures of "new aspects" put upon the case by this decision, to their great and unprecedented surprise, we wish here to call the attention of the court to the fact that the point has been expressly and continuously made by us (see our brief in R. R. Co. *vs.* Adams, 73 Miss., 656, 657, and our replications and instructions in No. 244 here, in that record, on pages 59 and 115), and their failure to apply for certiorari has been willful and deliberate.

There is also another difference between the suits, in that the exemption claimed for the Canton, Aberdeen and Nashville Railroad Company in the first suit is a straight exemption, while that claimed in the two subsequent suits is claimed to be an appropriation of taxes to construction debts.

In the first two suits the presiding judge certified up the question of jurisdiction by reason of non-residence, which does not figure in the third suit. In other respects there is such a similarity in the motions, orders, proceedings, and decrees and certificates that we think we can argue them all together.

Opposite counsel in their last brief in No. 318 cite an authority of this court to the effect that it will not, on an appeal on the question of jurisdiction alone, consider the merits of the case, referring to the case of Huntington *vs.* Laidley, decided March 19th last. We have never disputed, and do not now dispute, that this is the correct practice. What we contend for is that the certificate of what grounds the final decree is based on cannot contradict *the decree itself*, which is the highest evidence of that fact, and that the decree on the face of it is based on one ground not certified, namely, that "the complainant has shown no right to invoke the jurisdiction of this court," and that the certificate itself does not on its face specify that the grounds certified are all the grounds on which the court acted, and this court has decided that the ground of want of jurisdiction of the

court as a Federal court must be the controlling ground. As the points made in the briefs on the merits in the three cases are substantially the same otherwise as in their brief on the motion to dismiss or affirm in No. 318, we will for convenience hereafter generally refer only to that brief. As we are not exactly pleased with the statements of the cases by opposite counsel, we ask the court to take the statements in our separate briefs as our view of the cases.

FIRST.

The Subsequent Proceedings and Judgments in the State Courts.

This is a question which lies at the threshold of any argument on the questions involved in the cases themselves. It is the question of *qui bono*. What is the use? What can be accomplished? We have argued this question in our separate briefs in Nos. 318, 319, and 320 on pages 15–17, 19, 20, and 11–15, respectively. In Nos. 318 and 320 the appellants filed the counter-affidavits of Mr. Edward Mayes that when the appeals from the lower courts were taken to the State supreme court supersedeas bonds were given under the State statute. Apprehending some such point after our briefs were prepared, we had printed and inserted in them, on page 17 in No. 318 and page 13 in No. 320, quotations from the Mississippi Code of 1892 to show that it was therein expressly provided, in section 32, that it made no difference whether supersedeas bonds were given or not: "In no case shall such appeal be held to vacate the judgment or decree."

In our briefs in support of the motions to dismiss or affirm we have cited this court to a large number of cases on pages 16 and 17 in No. 318 and 11–15 and 25–34 in No. 320, where such judgments or decrees are held to be *res adjudicata*. Opposite counsel have cited some to the

contrary, but the vast majority, including those of this court, are in our favor, and, so far as judgments and decrees in Mississippi are concerned, the fact that the appeal does not vacate them is settled by the above statute. The appellant's counsel attempt to avoid the force of this by claiming that it cannot be raised by motion, and quote from a Minnesota case. At best, that would be a mere technical point as to whether it should be raised by motion or plea, and, as it is raised on three weeks' notice, supported by affidavits *and resisted by counter-affidavits*, that would be a waiver of the point, and anyhow, under such circumstances, where the facts are now all before the court and the whole case is heard, it could be treated either as on motion or informal plea.

But even if it had not been thus waived, the practice is against that contention.

In the case of Marsh *vs* Shepard, 120 U. S., 597, it was raised by motion, which was denied solely on the ground that the motion was made by one of three appellants and not by the appellee, and was resisted by the other two appellants, and the court very properly held that one appellant had no right to dismiss an appeal against the consent of his co-appellants.

In the case of Mills *vs.* Green, 159 U. S., 651, where an injunction had been granted against the holding of a constitutional convention in South Carolina, the circuit court, on a hearing, continued the injunction to the regular hearing. An appeal was taken, and the circuit court of appeals reversed this ruling, dissolved the injunction, and ordered the bill to be dismissed, on June 16, 1895, and on September 4, 1895 (of course the difference between those dates and between April 25 and April 26 here is immaterial), an appeal was taken to this court, as in the cases at bar.

On page 563 this court says that its "duty is to decide actual controversies by which a judgment can be carried into effect, and not to give opinions upon moot questions, or

abstract propositions, nor to declare principles or rules which cannot affect the matter in issue before it. When an event occurs without the fault of the defendant, which renders it impossible for this court to grant the appellant any relief, the court will not proceed to a formal judgment, but will dismiss the bill;" and then the court says, "And such a fact, when not appearing on the record, may be proved by extrinsic evidence," and on that and the succeeding pages the court cites numerous instances dismissed on motion, and that case was dismissed on motion.

Opposite counsel are very much given to contending, but we do not suppose that even they would contend that the revenue agent was *at fault* in bringing suit at the earliest opportunity, when he could not sue in the Federal courts, and taxes before judgment do not bear interest, and there was no chance for him to obtain judgment in these injunction suits where he was *a defendant*, and when all further liability on the injunction bonds ceased when the appeals and bills were dismissed and he was left free to sue, *and other innocent purchasers might have appeared.*

In the case of Hubbell *vs.* The United States, in 171 U.S., 209, 210, this court has gone the length of holding that it was doubtful whether even the pendency of a motion for a new trial in the same court would prevent the operation of the judgment as an estoppel or *res adjudicata*, and certainly such a motion would suspend the issuance of execution.

It could not possibly hurt the appellants, for if they are sued in the State court and have a Federal question they can get it here by a writ of error, whether they are residents or non-residents. We wish to retract here a concession we made in our brief in No. 318, on page 16, to the effect that the rule should not apply where non-residence was the ground of jurisdiction, if *bona fide* and not collusive. We were led into that admission by the thought that non-residents sometimes get the benefit of Federal rules, which

were denied them in the State courts, and that hence where the claim of non-residence was well founded the Federal court should not release its jurisdiction, and opposite counsel, following in our wake and taking advantage of our slip in this particular, have, on pages 14–16 of their brief in opposition to our motion to dismiss or affirm in No. 320, vividly portrayed the disastrous consequences to the Federal courts from setting such precedents as we ask; but the answer to both of us, to our ill-advised concession and their contention, is that if there is any such separable controversy as would enable a non-resident to sue in the Federal court, he can equally as well remove the suit against him from the State court to the Federal court, and hence there is not, under any view of it, the same incentive or necessity for the Federal courts to retain jurisdiction as for other courts, for when once the State courts surrender their jurisdiction in such cases it is gone forever, never more to return by either removal or writ of error, and, as we have shown, the great majority of the State courts hold that the judgment *pendente lite* is *res adjudicata*, and that its force and effect is not affected by the pendency of a writ of error.

The case of Huntington *vs.* Laidley, decided by this court on March 19, is referred to by opposite counsel; but what we wish to call the attention of the court to here is that the real gravamen of the motions to dismiss on this ground is not that the judgments of the State courts are *res adjudicata*, except incidentally, but that the object of the bills is to prevent the revenue agent from suing, *and he has sued*, and hence the purpose and object of the suits have failed.

If it be claimed that the bills have a further object shown in the prayers for relief, which is not only to establish a perpetual injunction against the particular taxes in controversy, but to declare the contracts of exemption valid and to establish a perpetual injunction against all future taxes, the plain answers to that contention are that so far as the suits seek to do such a thing as that they are on their faces

clearly and incontestably suits against the State and forbidden by the eleventh amendment, and that neither the assessing board nor the revenue agent have any jurisdiction or authority to represent or bind the State as to future taxes, and if this court can now grant them leave to amend and eliminate this unconstitutional demand from the prayer of their bills, unasked by them and against their previous protest, seeing that they have not amended, but have appealed on the bill as it stands, as not involving a suit against the State, then we repeat that the suit as thus narrowed to proper limits has already failed, because the suits for the taxes in controversy have already been brought.

The question of *res adjudicata* or of a reversal by the State supreme court has nothing to do with the point at issue except incidentally. It is utterly immaterial as to whether the State court shall affirm or reverse, whether it shall decide in favor of the plaintiff or of the defendants. It was necessary for us to show the status of the suits in the State courts, to show that they had not been abandoned, and to do this we showed all the steps, and that they had finally passed into judgments, which were *res adjudicata*, but the real point is that neither the court below nor this court now have any lawful or physical power to prevent the revenue agent from suing, *because he has sued.*

Dunn v. Greene Co. 76 Miss 694

10092

SECOND.

There was no jurisdiction by reason of diversity of citizenship. This only applies to the first two cases, Nos. 318 and 319.

We think we have shown that under well-recognized rules of equity pleading and practice the Illinois Central Railroad Company had no right to raise jurisdiction in the Federal court, *nor in any other equity court*, by making the owner of the property a defendant and itself the sole plaintiff.

In each case the judge gives a synopsis of the bill prefatory to the certificate of grounds, but as in the order designating the parts of the record to be copied and sent up here the original bills are specified and are part of the record here, of course they are the best evidence of what is contained in them, and so as to the various interlocutory and final decrees. The certificates, omitting the special grounds certified, are all alike and as follows:

"Now therefore it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:" * * * "The court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions arising upon the pleadings, the process, and the evidence, are hereby certified," &c.

It is not necessary for us to dispute the proposition contended for by opposite counsel in their brief in opposition to our motion to dismiss or affirm in No. 320, on page 8, that the certificate of the judge is in proper form, nor the proposition contended for in their similar brief in No. 318, that where the certificate is irregular, nevertheless this court will examine the record, and if it appears that the question

of the jurisdiction of the court, *as a Federal court*, was in issue, and was the controlling question, and was decided, this court will entertain jurisdiction. In paragraph 10 of their said brief, in No. 320, opposite counsel virtually admit that the Federal question must be the controlling one. It is not necessary for us to dispute these propositions here. What we do say is that the rule must work mutually and both ways, and where the certificate does not show that other questions were not decided, but the record shows that they were, this court will not entertain jurisdiction.

Now, in these cases we contend not only that the decrees import absolute verity, but we go further and say that here what was decided in the decrees is itself the very point at issue, and that as a physical fact of ocular demonstration the decrees themselves are the highest and best evidence, coming as they do like a tyrant and overthrowing all theories and mere assertion, whether by certificate or otherwise. It is incontestable that the part of the certificate, *supra*, that "the court having dismissed the bill on the grounds of want of jurisdiction, the foregoing three questions," &c., are certified, puts the grounds of want of jurisdiction in the plural number, showing that there were more than one, and yet not showing that the three grounds certified embraced all, and especially not stating, "On the grounds of the want of (ITS) jurisdiction" *as a Federal court*, or any equivalent words or expression, to show that want of jurisdiction as a court of equity or court generally was not meant.

The restraining order was discharged and injunction refused on two grounds stated in the decree, viz: That "the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction." Then a motion was made at the next term of the court to dismiss the bill because the sole object of the bill was for an injunction which had been refused, and an appeal to the United States circuit court of appeals dismissed for want of jurisdiction. Then follows the final

decree dismissing the bill from which this appeal is taken. That decree adjudges "that said motion be, and the same is hereby sustained, and that the original bill be and the same is hereby dismissed."

Under a proper showing a bill can be amended after an injunction has been refused or dissolved, and the injunction still granted or reinstated.

1st Smith's Chan. Prac., marg. pp. 623–626.

Here no leave was asked to amend, and in that state of case the dismissal of an injunction bill naturally and necessarily follows in due course the refusal or dissolution of the injunction, for the simple and plain reason that there is nothing else the court can do. It leaves an unbridged chasm which cannot be crossed.

From this it also naturally and necessarily follows that the ultimate ground or grounds on which such a bill is dismissed is or are identical with that or those on which the injunction was refused or dissolved.

Our contention is that the second finding in the decree refusing the injunction, "that this court has no jurisdiction," is not necessarily confined to, but does embrace all questions of the jurisdiction as a Federal court, and hence all the questions certified, and that the first finding, that "the complainant has shown no right to invoke the jurisdiction of this court," must be referred to some subject-matter other than that of an inherent want of jurisdiction in the court, else it would be entirely unnecessary and superfluous.

We think it plainly refers not to an insufficiency of jurisdiction, but to an insufficiency of showing to call forth an exercise of that jurisdiction, "has shown no right to invoke the jurisdiction," admitting that it does exist and extends to the subject-matter of the suit, but that for some reason the plaintiff has failed to show why he has a right to invoke it. That does not go to the jurisdiction of the court as a

Federal court, at least not necessarily so, but to the disability or want of right of the plaintiff to bring the suit.

We have attempted to show that the plaintiff has shown no right to sue either as a lessee, creditor, stockholder, or bondholder under any recognized head of equity rules. In their brief in opposition to our motion to dismiss or affirm, in No. 318, opposite counsel do not seem to attempt even to dispute this, but endeavor to escape its force by asking this court to arrange the parties on the proper side of the docket, as they do in petitions for removal and other proper cases; but in a case like this it cannot be done. It could be done if the defendant railroad companies and trustee had on request refused to sue, and the plaintiff had for that reason been forced to sue alone, and make them defendants; but in this case the plaintiff has not been forced on one side of the docket by its antagonist or by circumstances over which it had no control, and was therefore entitled to ask protection at the hands of the court. It was a voluntary matter and entirely unnecessary, and to place and arrange the parties on the proper side of the docket here would overturn one of the most salutary rules of equity pleading and practice, and this without regard to whether any Federal question was involved. That is utterly immaterial. An improper plaintiff has no more right to go into the Federal court on a Federal question than on any other question, and no more than he has to go into any other equity court.

But we go further than that, and have endeavored to show, *supra*, that the basis of want of jurisdiction here is not a lack of diversity of citizenship alone, or the presence or absence of any Federal question, but an utter want of authority to file a bill in any court of equity under the circumstances *shown and not shown* in these two cases.

Hence we claim that in no view of it is this a case where this court would be justified in arranging the parties on the appropriate sides of the docket, and thus CREATING a jurisdiction for the parties where none before existed.

THIRD.

Amount Not Sufficient to Confer Jurisdiction.

We have argued this point as to Nos. 318 and 319 in our separate briefs, on pages 25, 26, and 27, 28, respectively.

The same objection applies to the bill in No. 320. In paragraph 19, Record, p. 10, in that case, it is said that more than $2,000 is due in each county, but the State and municipal taxes are all collected *in the counties.*

Mississippi Annotated Code of 1892, § 3801.

And it is not shown that as much as $2,000 is due *to any county,* or to the State, or any town in any county, and this court holds that these taxes are all severable, and that it must affirmatively appear what amounts are due *to each* to confer jurisdiction.

See above briefs in No. 318 and No. 319, and Holt *vs.* Ind. Mfg. Co., 176 U. S., 72, 73.

FOURTH.

No. 318: Innocent Purchaser.

So far as the Illinois Central Railroad Company being an innocent purchaser is concerned, the eighth and fourteenth paragraphs of their bill in this case (Record, pp. 8 and 14) show that it procured the charter of the Canton, Aberdeen and Nashville Railroad Company, advanced the money to build it, and leased the road under an agreement with the judiciary committee of the legislature and the governor, and that everything it has done was agreed to and contemplated in the charter before and at the time it was granted, and hence it occupies and can occupy no different or better attitude, but only the identical attitude which the Canton,

Aberdeen and Nashville Railroad Company itself occupies. It has done nothing since the charter was granted or on the faith of any subsequent decisions which entitles it to any other or different consideration in law, equity, or morals, and hence there can be no claim or pretense by which it has or could have any separate or independent rights to sue for which would not be equally available to the Canton, Aberdeen and Nashville Railroad Company or which would justify any separation of interests or placing them in an adversary position on the docket.

The charter was granted on February 17, 1882, and the road built in 1882–1884. At that time there had been no tax decision except the Mississippi Mills case, in 56 Miss., p. 40, in 1878. The next case was the McCulloch case, in 64 Miss., at the October term, 1886, and that simply decided that outlying lands of a railroad company were liable to taxation. That was all that was involved. The next case was the Taylor case, in 1891, in 68 Miss. Hence the only decision on which the plaintiff could have relied was the Mississippi Mills case.

That case decided that under sections 13 and 20 of article 12 of the constitution of December 1, 1869, the legislature could grant repealable exemptions to all factories of a certain class, but did not decide and the reasoning of the court on pages 54, 55, and 62–65 is against the proposition that the legislature could discriminate by granting exemptions to one corporation or one individual, while others of the same class were taxed.

And in regard to the privilege taxes which were imposed on railroads by the "Laws of 1884," pp. 29, 30; the "Laws of 1886," p. 23; the "Laws of 1890," pp. 12, 13, and section 3379 of the Code of 1892, it is expressly held in the case of Holberg *vs.* Macon, 55 Miss., pp. 114, 115, that "all that is necessary in levying them is that all persons pursuing the same occupation shall be taxed to the same amount or in the same ratio."

So it is evident that the exemption involved in this case is a very different one from that in the Mississippi Mills case. In the case on writ of error here as No. 244 the supreme court of Mississippi decided two things applicable here: First, that the legislature had no power to grant exemptions like this one to a single corporation (see record in that case, pp. 659–671), and that all pretended exemptions were repealed by the laws of 1886 and Code of 1892 (see *ibid.*, pp. 671–673); and this court, in the case of Wood *vs.* Brady, 150 U. S., 20–23, hold that where the charters are not identical the rule of *stare decisis* does not apply, and the decision of the State court is conclusive on it and raises no Federal question; and as to the repeal, it is difficult to see how a decision that a repealable exemption was repealed could give color for any Federal question. Besides, when the bill was filed in this case, in August, 1898, it had not been decided that exemptions were repealed. This decision was rendered on November 22, 1898.

FIFTH.

No. 320.

The same reasoning as under the previous head applies to the original Louisville, New Orleans and Texas Railway property in No. 320. That charter was also granted in the acts of 1882 and 1884 after the Mississippi Mills case and before any other case was decided. This case is for the taxes of 1898, and the Supreme Court in the case No. 244, now pending here, has decided in suits for the taxes of 1892–1897 that for several reasons that property is liable to taxation. See their exhaustive opinion in the record in No. 244, pages 638–676.

That decision cannot be attacked collaterally by a bill in the Federal court, this court remarking that "if the State

court erred in its judgment, it is mere error and cannot be corrected through the medium of bills such as those under consideration."

Blythe *vs.* Hinkley, 173 U. S., 507, 508.

On this point, see our brief in No. 320, pages 25–34, 42.

175 U. S. 631–637. 174 643–647.

We now direct the attention of this court particularly to the fact that the bill in this case, No. 320, while it would be considered to be skillfully and adroitly drawn under other circumstances, yet in this case is purposely made vague and uncertain, as shown in our separate brief, under the heads of D, pages 36–38, and E, pages 38–43, in that it does not show that the taxes were appropriated to construction debts before the year 1898 or what became of the surplus of profits in 1898, and claims that a railroad company formed in 1884 *built a railroad in the years 1882–1884.*

But, worse than that, it utterly fails to call the attention of the court to the decision of the Supreme Court in No. 244 in reference to this same property, and they obtained an *ex parte* restraining order on this bill. The rule in such cases we understand to be—

"Where a party applies *ex parte* for a special injunction, he is bound to state in his bill every material fact, and set up every material document, bearing upon the subject-matter of the litigation, so far as it can affect the question of the injunction prayed for, and where any material fact or docment is omitted and not brought to the attention of the judge in hearing the application for an *ex parte* injunction, the court will immediately order the discharge of the injunction, and direct restitution of any change effected thereby."

Story's Equity Pldgs., § 730 (*b*) and n. 4.

And in this case we think this was certainly sufficient ground for discharging the restraining order, and also for refusing the injunction in that indefinite and uncertain

state of the bill, where no right was shown to invoke the jurisdiction of the court.

And in the record in No. 244, page 412, and R'y Co. *vs.* Blythe, 69 Miss., 943, 944, and N. O., B. R., V. & M. R. R. Co. *vs.* Brown. 64 Miss., 479, and M. & V. R. R. Co. *vs.* Cocke, 64 Miss., 713, and the record in case No. 5513, in connection with the last-named case, filed as a part of it in No. 244, it is shown that the railroad was not built by the Louisville, New Orleans and Texas Railway Company at all, but before it was formed and by one of its constituent companies, which had no exemption, viz., the said N. O., B. R., V. & M. R. R. Co. (See pages 16–18, 25, and 50–54 of said Record No. 5513.)

SIXTH.

Nos. 319 and 320.

As to the Natchez, Jackson and Columbus Railroad Company and that property, that charter, if considered as granted in 1870, was granted before the advent of the Mississippi Mills case, and hence there could have been no reliance on anything except the plain, palpable attempt to evade the constitution of 1869, and this court and every other court, and now the supreme court of Mississippi, all hold that pretended grants of exemption under that and similar constitutions are void *ab initio*.

See opinion in No. 244, pp. 638–676.

And, besides, we particularly call the attention of this court to the fact that neither the charters of this Natchez road nor of the Memphis and Vicksburg Railroad Company, one of the constituents forming the Louisville, New Orleans and Texas Railway Company, were accepted or gotten on the faith of any exemption, for the simple reason that they were both procured originally without any exemption, and that after this twenty-first section had been worked

through the legislature for the Mobile and Northwestern Railroad Company these two companies and a lot of others rushed in and got it extended to them by a general bunching act.

Laws of 1870, p. 327.

Which shows that the question of exemption was not a part of the original contract nor any inducement or incentive in it, but a mere matter *of take all you can get*, and an afterthought.

On the other hand, if the exemption was repealed by the Code of 1880 and re-enacted in 1884, as held in the Lambert case, in 70 Miss., then, as the railroad had already been built, the new exemption was without consideration and entitled to no protection from the Federal Constitution, as held by this court in—

Grand Lodge *vs.* New Orleans, 166 U. S., 146–150.
See Record in No. 319, p. 10.

As to any claim of *bona fide* purchaser by either the Louisville, New Orleans and Texas Railway Company or the Illinois Central Railroad Company, it is sufficient to say that the purchase by the first was made in March, 1890, the purchase by the latter of bonds and stock was made in July, 1892, and the consolidation was in October, 1892, all before the Lambert case was decided, and besides this court has settled the doctrine in Central Land Co. *vs.* Laidley, 159 U. S., 109–112, that the question of *bona fide* purchaser is not a Federal question. As to the contention that the Illinois Central Railroad Company issued any bonds after the Lambert case was decided in 1893, *and in reliance on it*, that is a palpable mistake, for the simple reason that the Illinois Central railroad mortgage of *September 1, 1892*, expressly provided for the issuance of the bonds, and surely they did not rely on the Lambert case then.

Hence there was no jurisdiction by virtue of any proper Federal question under the second certified ground.

SEVENTH.

No. 319 and No. 320.

In both these cases it is admitted that the receipts which the sheriffs and tax collectors were required to give on the delivery of the affidavits required in said section 21 were not given. In No. 320 it is averred that the tax collectors refused to receive the affidavits or give the receipts. We have answered this averment in our separate brief in that case on pages 34, 35.

In No. 319 the plaintiff attempts to make two points in reference to this subject of the receipts. In the seventeenth and eighteenth paragraphs of the bill, Record, pages 23–25, it is alleged that the failure to deliver the affidavits and obtain the receipts was due to the neglect and failure of the assessing officers to assess the property, and, second, that this is immaterial, as the plaintiff and the Yazoo and Mississippi Valley Railroad Company had a right to presume that the affidavits had been made and the statute complied with, and are innocent purchasers.

In regard to the first point it is sufficient to say that under chapter 10, sections 597–608, of the Code of 1880, under which assessments were made, until replaced by chapter 116, sections 3875–3884, of the Code of 1892, that section 597 expressly required the railroad companies to furnish and file with the auditor of public accounts schedules of their property in order that assessments might be made, and there is no allegation or pretense in the bill that this necessary and preliminary duty was ever complied with by the Louisville, New Orleans and Texas Railway Company, and it is a very remarkable theory attempted to be palmed off on a court that a party can take advantage of his own wrong. But for fear that the court might expatriate them to climes where such a contention would find more congenial

ears, they hurry on and say that is all immaterial because they are *bona fide* purchasers.

We here particularly call the attention of the court to the fact that the Yazoo and Mississippi Valley Railroad Company *is made a defendant* in No. 319, and is not complaining at all, and that the Illinois Central Railroad Company is not a purchaser at all. We really do not see where it comes in, because its protegé, the Mississippi Valley Company, which is not made a party, holds the stock, and the Illinois Central Railroad Company has substituted in the open market its own bonds for those of the Louisville, New Orleans and Texas Railway Company, the bonds of the latter company being merely deposited as a kind of collateral security, but which draw no interest and no payment. We confess we cannot see clearly through that kind of business. The Louisville, New Orleans and Texas railway bonds are merely collateral security *to the creditors* of the Illinois Central Railroad Company. What legal interest has the Illinois Central Railroad Company here? Neither the principal nor interest is paid. They are a mere pledge of the property of the Louisville, New Orleans and Texas Railway Company to secure bonds of the Illinois Central Railroad Company, and it seems to us that if anybody has a right to complain here, it would be the holders of the bonds of the Illinois Central Railroad Company, whose bonds were being impaired. What has the Illinois Central Railroad Company to do with it? The L., N. O. & T. and N. J. & C. R. R. Co. bonds are a mere pledge or security to creditors that the interest and principal of the bonds of the Illinois Central Railroad Company would be paid. There is nothing to be paid on the L., N. O. & T. or N. J. & C. bonds. If it be said that the Illinois Central Railroad Company has such an interest that it has a right to have the profits of the Yazoo and Mississippi Valley Railroad Company applied on its own Illinois Central bonds, the answer to this is that there is nothing in its mortgage of September 1, 1892, or

in the record to show this, and, if there was, they are not entitled to the aid of a court of equity to make the application, because, through the Mississippi Valley Company, they had the absolute control of the Yazoo and Mississippi Valley Railroad Company and could make the application themselves *without resorting to a suit against themselves.*

But if we concede that it is both a stockholder and a bondholder, then any claim to relief by virtue of its being a *bona fide* purchaser is untenable in this class of cases. It is a well-known fact—part of the history of the times, of which this court will take judicial notice—that the stocks and bonds of the great railroad corporations are constantly changing hands in the open market, and if every purchaser has a right to presume that back taxes have been paid, it would simply amount to a denial of the right or authority to collect delinquent taxes at all.

This court has several times, and once where the Yazoo and Mississippi Valley Railroad Company was concerned, decided that these back taxes can be collected.

Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., 185.
Winona *vs.* Minnesota, 159 U. S., 528, 529.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.

See also to the effect that there can be no innocent purchaser against back taxes:

Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.
Our separate brief in No. 318, p. 37.

The statute expressly makes taxes a legal lien on the property paramount to all others, and hence all must take notice that when a liability for taxes is fastened on property it must per force be superior to any claim they may have.

Code 1880, § 470; Code 1892, § 3746.

Even if it were not paramount, but merely entitled to priority according to its date, like a mortgage or trust deed, a purchaser cannot rely on the presumption that it has been paid or become barred by limitations. His only safe course is to consult *the creditor*, where he will find the truth. Any application to the proper authorities would have disclosed the fact that these taxes had not been paid, and the purchaser would have had to assume the risk.

Plant *vs.* Shryock, 62 Miss., 821.

Bowmar *vs.* Peine, 64 Miss., 104, 105.

And the above case in 62 Miss. was decided at the *April term, 1885*, before any of the taxes in controversy accrued, the revenue agent only being authorized to collect taxes back to and including the year 1886.

Laws of 1894, pp. 29–31, § 6.

Other questions are argued in our separate briefs in each case to which we respectfully refer the court, as well as to briefs of associate counsel.

F. A. CRITZ,

R. C. BECKETT,

Of Counsel for Appellees, Except the C., A. & N. R. R. Co. and Y. & M. V. R. R. Co.

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Nos. 77 and 78.

Ill. Cent. R. R. Co. to Bk. of Brookhaven v. Adams.

For Appellees.

Filed Oct. 16, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Nos. 77 and 78.

ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

Appeals from the Circuit Court of the United States for the Southern District of Mississippi.

This is Report of Yazoo and Mississippi Valley Railroad Company vs. Wirt Adams, State Revenue Agent, as to effect of judgment of State Railroad Commission assessing back taxes, as it will appear in 77 Mississippi Reports.

10100

Statement of the case.

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. *v.* WIRT ADAMS, STATE REVENUE AGENT.

1. TAXATION. *Railroads. Parties. Code* 1892, § 3746.

To a proceeding to foreclose the lien for taxes arising under § 3746, code 1892, a railroad company which has a majority of the stock and bonds, together with a majority representation in the directory of the company claiming the property sought to be subjected, is both a proper and necessary party.

2. SAME. *Railroad commissioners. Appeal. Constitutional law. Code* 1892, §§ 3875–3886, *inc. Laws* 1894, *pp.* 29, 31. *Const.* 1890, *sec.* 112. *Ib., sec.* 14. *Const. U. S., Amend. XIV.*

In view of sec. 112, const. 1890, authorizing the legislature to provide a special mode of valuation and assessment for railroads, code 1892, §§ 3875–3886, inc., and the act of 1894 (Laws, p. 29), which provide for their assessment for back taxes by the state railroad commission, without appeal, do not violate the constitutional provisions providing for uniformity and equality of taxation, prohibiting the deprivation of property without due process of law, and guaranteeing to every citizen the equal protection of the laws, although other taxpayers may, under general laws, appeal from the tribunal fixing their taxes.

3. SAME. *Railroad commission. Assessment. Collateral attack.*

Only for fraud can an assessment for back taxes by the state railroad commission be attacked collaterally.

FROM the chancery court of Hinds county, first district.

HON. HENRY C. CONN, Chancellor.

This was a proceeding to enforce a lien for taxes for the years 1886-1891, inclusive, on what was formerly the property of the Louisville, New Orleans & Texas Railway Co., in the hands of the appellants, the Yazoo & Mississippi Valley and Illinois Central Railroad Companies. The apellee, the state revenue agent, had previously instituted before the state railroad commission a proceeding to have the railroad property which

Statement of the case.

had been the property of the Louisville, New Orleans & Texas Railway Co. assessed for taxation, for the years above mentioned, as property which had escaped taxation for want of an assessment. In such proceeding notice was served upon the Yazoo & Mississippi Valley Railroad Co. as the successor of the Louisville, New Orleans & Texas Railway Co., and also upon the Illinois Central Railroad Co. This effort to secure an assessment was enjoined on the ground that the railroad commission had no authority to assess taxes for any year prior to the year 1892, when they were, for the first time, made assessors of railroad taxes, and the statute did not contemplate any assessments for years prior to that date by them. The injunction was dissolved, and the railroad commission proceeded and made the assessment in accordance with the demand of the revenue agent, and from the order making same the railroad companies took an appeal to the circuit court of Hinds county. Thereupon the revenue agent filed the bill in this cause setting forth the assessment made, and praying a decree for the amount of taxes, and the establishment of a lien, and a sale of the railroad property if the taxes were not paid accordingly. He set forth the consolidation of 1892, and showed how it was that the Yazoo & Mississippi Valley Railroad became the successor of the Louisville, New Orleans & Texas Railway, and alleged that the former company was then the holder of the property sought to be subjected. The bill made the Illinois Central Railroad Co. a party defendant, as well as the Yazoo & Mississippi Valley Railroad Co., averring their interest in the property, and also averring that the Illinois Central Railroad Co. had assumed to pay the taxes assessed. It alleged that the Illinois Central Railroad Co. was the owner of all the stock of the Yazoo & Mississippi Valley Railroad Co., and of a majority of the stocks and bonds of the Louisville, New Orleans & Texas Railroad Co., the latter stock being in the name of the Mississippi Valley Railroad Co., of which the Illinois Central Railroad Co. owned all the stock.

Brief for appellants.

To this bill the Yazoo & Mississippi Valley Railroad Co. interposed a plea, to the effect that the suit was prematurely brought, inasmuch as there was an appeal still pending and undetermined in the circuit court from the order of assessment. The Illinois Central Railroad Co. demurred to the bill, on the ground that the same did not show any liability on that company, nor any reason for making the same a party defendant. At a later date the Yazoo & Mississippi Valley Railroad Co. filed a further plea, setting forth the fact that the circuit court had dismissed the said appeal on the ground that the same was not authorized by law, and that tha said court had no jurisdiction thereof, and averring that the provisions of the code of 1892, from § 3875 to § 3886, and the act of 1894, in so far as the same authorized assessment for back taxes to be made against the railroads by said railroad commission, and authorized suits to be instituted thereon by the revenue agent, were unconstitutional and void. The Illinois Central Railroad Co. filed also an additional demurrer, raising the point that the act of 1894 was unconstitution and void because the same violated sections 14 and 112 of the constitution of the state of Mississippi, and the fourteenth amendment to the constitution of the United States. The court below overruled these demurrers, and held these pleas insufficient, and ordered the defendants to answer; whereupon the defendants prosecuted separate appeals.

Mayes & Harris, for appellants.

The bill shows no title in the property sought to be subjected, either legal or equitable, in the Illinois Central Railroad Co. The question comes to this: In a bill filed for the purpose of asserting a tax lien against the property of an incorporation, duly incorporated under the laws of the state, in possession of that property and operating the same, is it proper to make a party thereto a stockholder of the corporation and a holder of some of the bonds of the corporation? We contend that

Brief for appellants.

it is not. The corporation itself fully represents all the parties in interest. The court will observe that it has the title to the property, so far as this bill shows, both legal and equitable. The bill seeks to deal only with the property, and the Yazoo & Mississippi Valley Railroad Co., being properly summoned into court, represents all of its stockholders. If there is any reason why the Illinois Central Railroad Co., as a stockholder, should have been made a party to this bill, then, by parity of reasoning, every other stockholder should be made a party, and the record would be greatly incumbered.

So far as the holding of Louisville, New Orleans & Texas Railway bonds by the Illinois Central Railroad Co. is concerned it is not properly made a party on that account. The averment of the bill simply leaves the case in such attitude as that the Illinois Central Railroad Co. is alleged to be a creditor of the Louisville, New Orleans & Texas Railway Co. It does not aver that the bonds held by it are secured by any mortgage, or constitute any lien on the railroad which is sought to be subjected to these taxes, or any other railroad of the Louisville, New Orleans & Texas Railroad Co. And if such an averment had been incorporated into the bill, even then the proper party to have been brought in as defendant to represent the interest of mortgage bondholders would have been the trustee of the mortgage by which the bonds were secured.

In support of the foregoing proposition generally, we cite the following authorities: Story's Equity Pleading, secs. 226, 227; *Foster* v. *Railroad Co.*, 36 Fed. Rep., 627; *Shaw* v. *Railroad Co.*, 100 U. S., 605; 5 Monroe, 194; 2 Johnson's Ch., 197.

The so-called assessment made by the railroad commission, as stated in the original bill, was a nullity, for the reason that the statute appointing the said railroad commission to be assessors of railway property is void, being contrary to the provisions of § 112 of the constitution of the state. Sec. 112, so far as material, is as follows: "Taxation shall be uniform and equal throughout the state. Property shall be taxed in pro-

Brief for appellants.

portion to its value. . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporat property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county," etc.

The controlling provisions in this section are, first, that property shall be assessed under general laws, and by uniform rules, according to its true value, and, secondly, that the legislature may provide for a "special mode and valuation and assessment for railways," etc.

We contend that the uniformity rule for assessment does not permit the important and critical and delicate function of assessing property for taxation to be so managed by the legislature as to commit the assessment of some sorts of property to one body, and the assessment of other sorts of property to a different body. Such a distribution and separation of the power of assessment is not assessment by uniform rule within the purview of the constitutional provisions, especially when it is remembered that the constitution, in § 135, expressly provides for an assessor, to be selected in a manner provided by law, for each county, and these assessors and the board of railroad commissioners are elected by a different constituency, the one being county officers, and the other being state officials. It must be remembered, also, that the constitution contemplates that assessments shall be made for taxation by the assessor provided for in the constitution. See *French* v. *State*, 52 Miss., 759; *State* v. *Tonella*, 70 Miss., 701.

Nor does the provision that "the legislature may provide for a special mode of valuation and assessment for railroads" authorize the commitment of such assessment and valuation to the railroad commission. The section, as a whole, provides that property shall be assessed by uniform rules, according to its true value, and the further provision that a "special mode of

Brief for appellants.

valuation and assessment may be provided for" does not authorize a valuation and assessment by a different body of assessors. The word "mode" means "manner of doing or being; method; form; fashion; custom; way; style." See Webster's Dictionary. It does not import that this function can be committed to a separate body of assessors, but only means that the constitutional assessors may make their assessment, if the law shall so provide, in a manner different from that in which they assess property lying wholly within the limits of a county, and may make their valuation in a different manner.

The subject of assessing property which lay partly in one county and partly in another, and which was of such nature that it was not plainly and simply partable by county lines, had long been a subject which had given the legislature and officers of the state considerable trouble, and about which the courts had frequently been concerned. It was to this difficulty that the provision in the constitution for a special mode of valuation and assessment of such property, including railroads, was directed.

It cannot be said that the commitment of the assessment of railroad property to the county assessors would lead to inequality in this, that different county assessors would place different values upon railroad property in different counties, and, therefore, that the property would be valued on a higher basis in one county than in another county. That proposition would be more plausible than sound, for the reason that it is the amount of tax which the railroad property in a certain county is called upon to pay, as compared with the amount of tax which other property in the same county is called upon to pay, that is the material point. It makes no substantial difference to the railroad company if its property lying in Hinds county is assessed at full value while its property lying in Copiah county is assessed at two-thirds, provided all other property in Hinds county is assessed at full value, and all other property

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Brief for appellants.

in Copiah county is assessed at two-thirds. The substantial violation of the rule against uniformity and equality comes in where railroad property in a certain county is assessed for county and other purposes on one basis of valuation, and other property in the same county is assessed on a different basis of valuation. As we have already pointed out, this evil is almost certain to result in a case where the assessment is made by two different tribunals, having no relation to each other and no connection with each other whatever.

We claim, in support of the pleas of the Yazoo & Mississippi Valley Railroad Co., that if it be true that this act does not allow the right of appeal to the circuit court from an assessment made by the railroad commission under the act of 1894, that it is unconstitutional, because it violates § 14 of the constitution of the state of Mississippi and the fourteenth amendment to the constitution of the United States, not being due process of law and not affording the equal protection of the law.

We are perfectly aware that counsel will argue that an appeal is not a matter of right, that no person is entitled to an appeal from the decision of a court or authorized tribunal unless the legislature shall grant one. We do not controvert that proposition That is not our point. The point is, that it is not due process of law, and not equal protection of the law, to grant an appeal to one class of litigants and to deny it to another without any substantial reason or basis therefor. Why is such a discrimination? The legislature had a right to provide that no assessee for taxation should have any appeal to the circuit court, and it could have denied such an appeal simply by failing to grant it. Such would have been its power, but when it grants such an appeal as to property of one sort, and denies it as to property of another, it is making an unconstitutional and unauthorized discrimination.

As the case now stands, according to the decision of the circuit court, the ordinary taxpayers of the state cannot pay taxes

Brief for appellee.

unless the assessment against them, in case they object to it, is approved on a full examination of all the facts as well as the law, by the judicial department of the state as embodied in the circuit court, while another class of taxpayers are excluded from any appeal to the judicial department as to the fact involved in their case, and must stand or fall, so far as those questions of fact are concerned, which the assessing board is authorized to investigate on the determination of that board without any judicial review whatever. This is especially objectionable when it is remembered that the board authorized to make the assessment is not required to be composed of lawyers, and it is not given the sufficient and adequate machinery provided by law to the circuit court for the determination of intricate and complicated questions of fact and intricate and complicated questions of mixed fact and law. In this connection we call the attention of the court to the case of *Railroad Co.* v. *Moss*, 60 Miss., 641, in which case the court held that the act of 1882, p. 110, which provided that whenever an appeal is taken in an action for damages brought by a citizen of this state against a corporation, attorney's fees for the appeal should be assessed and included in the judgment, if affirmed, was unconstitutional as discriminating between classes of litigants, they held that it was not due process of law. Manifestly, it is also a denial of equal protection of the laws.

Critz, Beckett & Kimbrough, for appellee.

The bill charges that the Illinois Central Railroad Co. is the owner of the majority of the stock and bonds of the Yazoo & Mississippi Valley Railroad Co., and also has a majority of its directors. This not only gives it a right to the controlling interest, but the actual control. In other words, laying all fine-spun theories aside, they are in possession, and the party in possession is always a proper party to a suit to enforce a lien on the thing possessed. We are not trying to force them to comply with their contract. We are simply trying to enforce

a lien on the property. Code 1892, § 3746; code 1880, § 470; Story Eq. Pl., secs. 193, 389, 392, 392 (a).

The Illinois Central Railroad Co. have placed themselves in this litigation in a position where they are estopped to set up any such contention. They joined with the Yazoo & Mississippi Valley Railroad Co., and filed a bill against us to enjoin the making of this very assessment, and when it is made and we sue on it, they solemnly claim, on demurrer, that they have no interest. They cannot blow hot and cold. They may have had a right to stay out of the litigation, but, having brought themselves into it by the bill for injunction, an affirmative act on their part, they cannot get out of it on demurrer. Let them file an answer disclaiming any interest, and we will dismiss as to them on the spot.

Sec. 112 of the constitution says: "But the Legislature may provide for a special mode of valuation and assessment of railroads, and railroad and other corporate property, etc., not situated wholly in one county." But even without this express authority, it has been repeatedly held that assessments identical with the one at bar, by a special tribunal, and where no appeal was allowed, while appeals were allowed to individuals, is both constitutional and valid, on the ground that an appeal is not a matter of right, that a party is entitled to one trial, and only one, as a matter of law, and could not legally complain because the legislature saw fit, *ex gratia*, to extend appeals to others. The leading case is the first below: *Pittsburg* v. *Backus*, 154 U. S., 425-427; *Winona* v. *Minnesota*, 159 U. S., 533-538; *Fallbrook* v. *Bradley*, 164 U. S., 156-158, 167-170; *Adams Express Co.* v. *Ohio*, 165 U. S., 228, 229; *L. & N. Railroad Co.* v. *Louisville*, 166 U. S., 714; *Bridges* v. *Supervisors*, 57 Miss., 252, 254.

An appeal being entirely dependent on statute, it of necessity follows that any statute granting an appeal must be in express terms, and must specify the court or tribunal to which the ap-

Brief for appellee.

peal is to be taken, and there is no appeal allowed in any case from the state railroad assessors either in the code of 1892, §§ 3875-3886, or in the revenue agent act, acts 1894, p. 29-31, and there is no court designated to which an appeal could be taken. This is a case of back taxes. It is a case where assessments have failed to be made.

When the determination of a fact, necessarily involved in an inquiry, is submitted by law to the tribunal having jurisdiction in the premises, the determination of that fact is a judicial function, and the finding of the tribunal cannot be collaterally attacked. We need not go so far in this case, for in this case the fact to be determined was whether the Louisville, New Orleans & Texas Railway Co. had, as a matter of fact, been able to pay the dividend of eight per cent., etc., but the authorities all sustain the doctrine that the rule holds good even when the question to be determined is exemption or no exemption. A case exactly in point on these back taxes, where notice was required to be given, like the one at bar, is *Louisville Water Co.* v. *Clark*, 94 Ky., 47. And generally the decisions of the assessing boards on all questions of fact, in the absence of fraud, are binding, and this equally extends to cases where the question whether property is exempt or not depends on a question of fact. *Stanley* v. *Supervisors*, 121 U. S., 535; *Williams* v. *Supervisors*, 122 U. S., 154; *Winona* v. *Minnesota*, 159 U. S., 534-538; *Fallbrook* v. *Bradley*, 164 U. S., 167-170; *Anderson* v. *Ingersoll*, 62 Miss., 74, 75; *Investment Co.* v. *Suddoth*, 70 Miss., 423. See, also, especially Throop Pub. Officers, sec. 541 and cases: *Railway Co.* v. *Backus*, 133 Ind., 513; *Youngston* v. *Kentucky*, 64 Fed Rep., 441. And the decision of the assessing board is binding in all matters on which they are authorized to act and decide, including the legal right to exemptions. Cooley on Tax., p. 749, note; 2 Desty. on Tax., p. 625, note 2; Burroughs on Tax., p. 238, sec. 102; 2 ed. Black (not Blackwell) on Tax Titles, sec. 175; 25 Am. & Eng. Enc. L., p. 236. And

in such cases certiorari is the exclusive remedy. *Palmer* v. *McMahon*, 135 U. S., 665; *Boston* v. *Pork*, 19 Am. Dec., 332; *State* v. *Springer*, 134 Mo., 212.

It is true this court held in *Horne* v. *Green* that the decision of the board of supervisors was not conclusive on the question of exemption in assessments for current taxes "under statutory or constitutional provisions," but they place it on the ground that "it was not the intention of the legislature to submit such questions as these, without review, to the exclusive decision of a board of supervisors." 52 Miss., 456, 457. But in the case at bar it is not current taxes. It is back taxes. It is the state railroad assessors, and there does appear to be an intention of the legislature to submit this very thing to the decision of the railroad assesors. Acts 1894, sec. 4, p. 30.

Argued orally by *Edward Mayes*, for the appellant, and by *R. C. Beckett*, for the appellee.

WHITFIELD, J., delivered the opinion of the court.

The bill charges that the Illinois Central Railroad Co. is the owner of the majority of the stock and bonds of the Yazoo & Mississippi Valley Railroad Co., and has also a majority of its directors. Practically and substantially, therefore, the Illinois Central Railroad Co. has an actual controlling interest in the Yazoo & Mississippi Valley Railroad Co., and, to all intents and purposes, is in possession of its property. That is the real situation, and it is, through all forms, to the substance that courts look. Besides, it sufficiently appears that the Illinois Central Railroad Co. is a large bondholder of the Yazoo & Mississippi Valley Railroad Co., and so entitled to redeem. *Keokuk & W. Railroad Co.* v. *Scotland Co.*, 152 U. S., 326 (14 Sup. Ct., 605). If, in truth, the Illinois Central Railroad Co. had no interest, what was easier than to file a disclaimer? On the contrary, the exhibit to the bill shows that the Illinois Central Railroad Co. joined with the Yazoo & Mississippi Val-

ley Railroad Co. in filing a bill against the appellee seeking to enjoin him from making the very assessment here involved, asserting, in that injunction litigation, a real and vital interest; and yet, when the assessment is made, and the effort is being made by the revenue agent to enforce it, this same party, the Illinois Central Railroad Co., demurs, and says it is improperly joined as a party. It is not sought to obtain a personal decree against the Illinois Central Railroad Co. The theory of the bill is to enforce, *in rem*, against the property charged with the taxes, the amount of the taxes, to effectuate against, and out of, the property itself, on which the paramount tax lien is charged, that tax lien, and to have a decree subjecting the property to the payment of the taxes. Code 1892, § 3746; code 1880, § 470. And the Illinois Central Railroad Co. does have, as the party practically and substantially controlling this property, and practically and substantially in possession of it, a real interest in this controversy, and is, we think, a proper and a necessary party.

The only really serious contention of the appellants is the one presented by the additional demurrer of the Illinois Central Railroad Co., and the second plea of the Yazoo & Mississippi Valley Railroad Co., the substance of which is that one tribunal is provided by law for the assessment of railroad property and a different tribunal for the assessment of other property; and also that, if this be allowable, then the act of February 7, 1894 (Laws 1894, pp. 29-31), violates the constitution (§ 112), in granting an appeal to one class of taxpayers from the tribunal assessing the taxes of those in that class, and denying an appeal to another class of taxpayers (railroad companies) from the judgment of the tribunal assessing the taxes of those in that class. The insistence is that, in these two respects §§ 3875 to 3886, inclusive, of the code of 1892, as also the said act of February 7, 1894, are violative of the constitution of this state (§ 112), and of the constitution of the United States—that is

to say, of the fourteenth amendment thereto and the first section of the said amendment—in this, to wit, in denying to the appellants "due process of law" and "the equal protection of the laws." The former decision in this case (*Railroad Co.* v. *Adams*, 73 Miss., 648, 19 South., 91), really disposed of these contentions, for it would have been an idle performance to have rendered the judgment which was rendered, had this court deemed these acts violative of either the state or the federal constitution. But, aside from this consideration, it is clear there is nothing in the contentions. The constitution (§ 112) expressly provides: "But the legislature may provide for a special modes of valuation and assessment of railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county." Acting in pursuance of this constitutional authorization, §§ 3875-3886, and the said act of February 7, 1894, were passed. The purpose is plain. The scheme was to take railroad property because of its peculiar nature, and the inherent difficulties attending a just and wise adjustment of taxes on that class of property, out of the hands of subordinate county officials, and put into the hands of a board of special state assessors of railroad property for taxation; to segregate, for the purpose of taxation, all property of that class, all railroad property, and put it in a class by itself. All railroad property is dealt with alike. There is no discrimination between railroads. When the property of railroads is assessed, ample notice is actually given them, besides the notice the law gives them, in fixing the time when the state railroad assessors shall meet to impose the taxes and hear objections. They have a full hearing, upon a full notice, on both law and facts, as to the imposition of taxes on them. In this case they were duly served with notice. They appeared, interposed their objections; the fullest proof was introduced, as shown by the record; and their complaint now, on this second

appeal, at this late stage in this litigation, wherein the state is seeking to recover her taxes, the lifeblood of her existence, is that the appellants now think these acts unconstitutional.

It has been too long and too thoroughly settled to now admit of discussion, that it is not only competent, but necessary, in any justly-framed system of taxation, to provide for different modes of taxation of property, according to the different nature of the property, so long as all property of the same nature and class is dealt with alike. It is nothing more than a classification of property according to its nature and uses, and dealing with, as to its revenue-bearing duties, accordingly as all property of that class is dealt with. Uniformity and equality of taxation, as to the mere mode of imposing taxes, are not violated by putting all railroad property, on account of its nature and uses, and the difficulties attending its proper assessment for taxation, in one class, and assess it according to a special mode provided therefor by the legislature, so long as all railroads are dealt with alike, and there is, consequently, no discrimination between those in that class. This is too plain to need the citation of authorities. They are overwhelming. All along, it must be remembered that this is not an effort to assess current taxes, but back taxes. It is a case where the railroads have escaped taxation. Acts 1888, p. 49, sec. 1; acts 1890, pp. 12, 13, sec. 5; acts 1894, pp. 29-31, secs. 2-4. Nor does the fact that no appeal is given from the action of the state railroad assessors to the railroad companies violate either the state or the federal constitution.

It must be borne in mind that the appellants allowed the six months, within which the remedy by certiorari for the correction of errors of law was open to them, to expire without availing themselves thereof. Code 1892, §§ 89, 90. They had their full hearing, as shown on both the law and the facts. Nor did they, when the circuit court dismissed the appeal taken from the action of the state railroad assessors on

the ground of want of jurisdiction, because the law did not authorize such an appeal, prosecute an appeal from that judgment of the circuit court to this court. But the effort, now here being made, is to assail collaterally the finding of the state railroad assessors. This is directly in the face of the holding of this court, on the former appeal in this same case, where the court said, speaking through Chief Justice Cooper (73 Miss., 662; 19 South., 93): "By providing for notice to the owner, and thus affording him the opportunity of interposing his objections to his assessment of the property, the determination of all questions of fact necessarily involved in the inquiry is submitted by law to the tribunal having jurisdiction in the premises." That tribunal was this board of state railroad assessors. That board had jurisdiction of the parties and of the subject-matter, made the fullest investigation of the whole matter, and their finding cannot be thus collaterally attacked. The decisions of the supreme court of the United States are absolutely conclusive of this. In *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S., 229 (17 Sup. Ct., 312), that court says: "Whenever a question of fact is submitted to the determination of a special tribunal, its decision creates something more than a presumption of fact, and, if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than so found or determined." See, to the same effect, *Railway Co.* v. *Backus*, 133 Ind., 541 (33 N. E., 430), the court saying: "The state board having fixed the valuation and assessed the property, their action in this behalf is final, and cannot be avoided or set aside, except for fraud on the part of the state board of tax commissioners, which would render the assessment void." And see, to the same effect, *Water Co.* v. *Clark*, 94 Ky., 47 (21 S. W., 246); *Stanley* v. *Supervisors*, 121 U. S., 535, 550 (7 Sup. Ct., 1234); *Williams* v. *Supervisors*, 122 U. S., 154 (7 Sup. Ct., 1244); *Winona & St. Paul Land Co.* v. *Minnesota*, 159 U. S., 534 (16 Sup. Ct., 83); *Irrigation Dist.* v. *Bradley*, 164 U. S., 167 (17 Sup. Ct., 56); Throop on Pub. Off., sec. 541; Cooley on Taxation, p. 749, note 2; Desty on Taxation, p. 625, note 2; Burroughs on Taxation, p. 238, sec. 102; 25 Am. & Eng. Enc. L., 236; *Palmer* v. *McMahon*, 133 U. S., 665 (10 Sup.

Ct., 324). And so the decisions of the same learned court are decisive against appellants, that, having had provision made for notice, and one full hearing, the denial of the right of appeal to all railroads—all in the same class—is no denial of due process of law, or of the equal protection of the laws. Speaking to this very point, in *Railway Co.* v. *Backus*, 154 U. S., 427, 14 Sup. Ct., 1117, Mr. Justice Brewer says: "Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed, not merely one hearing before the county officials, but also a right of appeal, with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so, and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only one hearing. . . . Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?" And to identically the same effect are *Irrigation Dist.* v. *Bradley*, 164 U. S., 168, 169 (17 Sup. Ct., 56); *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S., 228 (17 Sup. Ct., 312); *Winona & St. Paul Land Co.* v. *Minnesota*, 159 U. S., 534, 535 (16 Sup. Ct., 83). Whether the "ordinary taxpayer" is given an appeal is no concern of the railroads, so long as there is a just and legal classification of railroad property, and a dealing with all in that class on exactly the same terms, some sufficient notice and hearing being afforded all railroads. The acts in question do not, therefore, violate the state or the federal constitution in denying to railroad companies an appeal from the action of the state railroad assessors.

It is further to be said that the action of that board was in conformity with the decision of this court rendered June 20, 1898 (No. 8629 in this court), 24 South., 317, and was for this additional reason, correct. That action, except for fraud, cannot now be assailed, but is binding and conclusive on the appellants.

Affirmed.

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Nos. 77. 78 and 79.

Petition for Rehearing.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 77 and 78.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL.

And No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL.

PETITION FOR REHEARING AND BRIEF IN SUPPORT OF SAME. ADDITIONAL AUTHORITIES.

FRANK A. CRITZ,
MARCELLUS GREEN,
R. C. BECKETT,
Attorneys for Appellees.

(17,432, 17,433, and 17,434.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-22-'01

Supreme Court of the United States

OCTOBER TERM, 1900.

Nos. 77 and 78.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL.

And No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

ADDITIONAL AUTHORITIES TO ADD IN BRIEF IN SUPPORT OF PETITION FOR REHEARING.

On pages 7 to 8 of our brief in support of the petition for rehearing, we ask the court, in aid of our said brief, to the point that it is the proper practice in equity to dismiss a pure injunction bill at the next term after the refusal of

or dissolution of a temporary injunction, on motion, to add and examine—

Sauls *vs.* Freeman, 12 Am. St., 190, 199.
Same case, 24 Fla., 209.
Am. Live Stock Co. *vs.* Chicago, &c., 36 Am. St., 399, 400.
Same case, 143 Ills., 210.
Indian River, &c., *vs.* East Coast, &c., 29 Am. St., 276.
Burlington, &c., *vs.* Dey, 31 Am. St., par. 19, p. 498.
Same case, 82 Iowa, 312.
(3d ed.) 2 High on Injunctions, and notes 2, 3, and 5, page 1140, citing—
Wade *vs.* London, 30 La. Ann., 660.
Titus *vs.* McGee, 25 Ills., 257.
Withers *vs.* Denmead, 22 Md., 135.

See also where the bills were dismissed in—

Jamison *vs.* Dulaney, 74 Miss., 890, 891, 892.
Hurley *vs.* Levee Commrs., 76 Miss., 141, 142.

In these cases the motions to dismiss the bills were because "the sole object of said original bill was for an injunction, as therein shown, which injunction was by this court refused," and the decree of the court is "that said motion be, and the same is hereby, sustained."

Record in No. 77 (318), pp. 43, 44.
Record in No. 78 (319), pp. 133, 134.
Record in No. 79 (320), p. 56.

There were several grounds of the motions to discharge the temporary restraining orders and to refuse the injunc-

tions, some of which were non-Federal; and while it is true that the court refused the injunctions because it finds "that complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction," still our contention is, as shown in brief filed with the petition, that on appeal this is not confined to the grounds recited by the lower court, but this court must examine for itself and sustain the lower court if any ground of the motion is good, and that such being the case, it is impossible in the nature of things under the pleadings that the bills could have been dismissed for want of jurisdiction, it matters not who says so.

For motions and decrees in reference to the injunctions, see—

No. 77 (318), pp. 31, 32, 38, 39.
No. 78 (319), pp. 89, 128.
No. 79 (320), pp. 18, 19, 51.
Prayers of bills respectively pages 26, 33, 12.

Respectfully submitted.

MARCELLUS GREEN.
FRANK A. CRITZ.
R. C. BECKETT.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL.

AFFIDAVIT OF WIRT ADAMS, SETTING UP THE DECREE OF THE STATE COURT SUBSEQUENT TO THIS APPEAL AS RES ADJUDICATA.

(17,433.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-8-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.

ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL., APPELLEES.

Affidavit of Wirt Adams Setting Up the Decree of the State Court Subsequent to this Appeal as Res Adjudicata.

Before me, L. B. Moseley, clerk of the circuit court of the United States for the southern district of Mississippi, this day personally appeared the within-named Wirt Adams, State revenue agent and appellee in the above-styled cause and well known to me as such, and, being by me first duly sworn, on oath states that he is such State revenue agent and appellee; that the court number of said suit was No.

560; that thereafter an appeal had been taken therein to the United States circuit court of appeals for the fifth circuit under said number 806 in that court; that after said appeal had been dismissed by said circuit court of appeals and before the bill was dismissed by said circuit court of the United States for the southern district of Mississippi, on May 1, 1899, and before this appeal was taken to this court he began a suit in the chancery court of Hinds county, first district, State of Mississippi, as said revenue agent, on April 25, 1899, for the recovery of the same identical taxes for the years 1886 to 1891, inclusive, on the identical property now in controversy in the bill in this suit, by the enforcement of the lien of said assessment made by said State Railroad Commission, as State railroad assessors, on August 2, 1898, the identical assessment sought to be enjoined in this suit; that appellant and Yazoo and Mississippi Valley Railroad Company and said State Railroad Commission were defendants to said suit and duly served with process therein; that appellant and Yazoo and Mississippi Valley Railroad Company on April 29, 1899, filed a petition and bond for the removal of said suit to the circuit court of the United States for the southern district of Mississippi on the ground that Federal questions were involved; that said petition was denied, on the ground that the cause was not removable in its nature, by said chancery court on May 8, 1899, and thereupon both of said defendants jointly answered the bill; that upon issues properly made in said suit the said chancery court, upon pleadings and proof, at the January special term, 1900, thereof, adjudged: 1, that as to the exemption or appropriation of taxes for the years 1886 to 1891, inclusive, on the said property, under said 21st section, extended to Natchez, Jackson and Columbus Railroad Company by act of August 8, 1870; that the said 21st section was unconstitutional and void *ab initio* under the constitution of 1869 of the State of Mississippi; 2, that if said exemption or appropria-

tion of taxes was valid, it was repealed by chapter 42, Acts of 1875, p. 66; 3, that chapter 11, Acts of 1878, p. 87, operated as a repeal of chapter 116, Acts of 1878, p. 233, purporting to re-enact said 21st section; 4, that said chapter 116, Acts of 1878, is unconstitutional and void under said constitution of 1869, and especially so because of the enactment of said chapter 11, Acts of 1878; 5, that, if then existent, said 21st section was repealed by chapter 10, Code 1880; 6, that it is doubtful if chapter 22, Acts of 1884, p. 29, re-enacted said exemption; but, if so, said chapter 22 was unconstitutional in this regard under said constitution of 1869; that if said chapter 22 re-enacted said exemption, or if said exemption was then existent, it was repealed by chapter 2, Acts of 1886, p. 23, and by chapter 2, Acts of 1890, p. 12; 7, that if said chapter 2, Acts of 1890, could be treated as recognizing said exemption as reinstated by said act of 1884, such recognition was unconstitutional and void under said constitution of 1869; 8, that the decision of the State Railroad Commission in making the assessment in controversy in August, 1898, was made both on the law and the evidence on regular hearing on notice, as appears from the pleadings and records in evidence therein, and that said decision was *res adjudicata* and established conclusively the liability of said property to taxation, and that said taxes had not been paid; 9, that the decisions of the supreme court of Mississippi in numbers 8629 and 9251 of that court on appeal from the circuit court of Hinds county in case number 2788, consolidated (being No. 244 of this court), are *res adjudicata*, and establish conclusively the liability of the property in controversy to taxation; 10, that said chancery court, considering the other issues presented by the pleadings and evidence "to be unnecessary, immaterial, and irrelevant, declines to decide the same," and final decree was thereupon rendered by said chancery court declaring the lien of said taxes upon the property in controversy a superior lien and enforcing the said lien for said taxes against the said property and decreeing a sale

thereof to pay the same, but not rendering any personal decree therein against appellant and Yazoo and Mississippi Valley Railroad Company except for costs of suit; that thereafter said defendants sued out an appeal from said decree, returnable to the March term, 1900, of the supreme court of Mississippi, and said appeal is still pending and undetermined, and the said decree still stands in full force and effect, unmodified, unreversed, or unaltered, and the said Wirt Adams and said State Railroad Commission pleads said proceeding and decree of said chancery court in said cause numbered 1681 as *res adjudicata* and a bar to the further prosecution of the appeal in this cause, and prays that said appeal may be dismissed.

WIRT ADAMS.

Sworn to and subscribed before me this March 2, 1900.

[SEAL.] L. B. MOSELEY,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

[Endorsed:] File No., 17,433. Supreme Court U. S., October term, 1899. Term No., 319. The Illinois Central R. R. Co., appellant, *vs.* Wirt Adams, State revenue agent, *et al.* Affidavit of Wirt Adams setting up the decree of the State court subsequent to this appeal as *res adjudicata*. Filed March 7, 1900.

Original

No. 319. 78

Brf. of Calhoon & Green for Appellees

Office Supreme Court U. S.
FILED
MAR 7 1900
JAMES H. McKENNEY, Clerk.

Filed Mar. 7, 1900.

Supreme Court of the United States

No. 319.

October Term, 1899.

The Illinois Central Railroad Company, *Appellant.*

vs.

Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, Et Al., *Appellees.*

Brief in Support of Motion to Dismiss or Affirm.

S. S. CALHOON,
MARCELLUS GREEN,
Of Counsel for Appellees.

17,433

10115

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTION TO DISMISS OR AFFIRM.

Come all the appellees, except Yazoo & Mississippi Valley Railroad Company, and move the court to dismiss this appeal.

First. Because it is an appeal from a decree refusing to grant an injunction and the purpose and object of the injunction has failed;

Second. Because this court has no jurisdiction of this appeal;

Or, to affirm the decree it being manifest, even if this court has jurisdiction, that said appeal was taken for delay only, and the questions upon which the jurisdiction depends are frivolous.

~~R. C. BECKETT~~, R. C. Beckett
~~S. S. CALHOON~~, S. S. Calhoon
~~F. A. CRITZ~~, F. A. Critz
~~MARCELLUS GREEN~~, Marcellus Green

Attorneys for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

No. 319. vs. APPELLANT,

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

NOTICE.

To MR. EDWARD MAYES,

Attorney of Record for Appellant in the above styled cause.

You are notified hereby that the appellees, except said Yazoo & Mississippi Valley Railroad Company, in the above-named cause will, on Monday, the 26th day of March A. D. 1900, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm, and the brief of the argument thereon hereto attached.

R. C. Beckett ~~R. C. BECKETT~~,

F. A. Critz ~~F. A. CRITZ~~,

S. S. Calhoon ~~S. S. CALHOON~~,

Marcellus Green ~~MARCELLUS GREEN~~,

Attorneys for said Appellees.

10116

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

No. 319. vs. APPELLANT,

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *et al., Appellees.*

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Mosely, clerk of the circuit court of the United States, for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above named Wirt Adams, one of said appellees, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he duly delivered in person to Mr. Edward Mayes, one of the attorneys of record for the above-named appellant, in person, a true copy of the attached motion, notice and brief of the argument, together with a copy of his affidavit, setting up the decree of the State Court as *res adjudicata.*

Wirt Adams

Sworn to and subscribed before me, this 2 day of March, 1900. L. B. Mosely *Clerk.*

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *et al., Appellees.*

Appeal from the circuit court of the United States for the southern district of Mississippi.

ON MOTION TO DISMISS OR AFFIRM.

Brief of S. S. Calhoon and Marcellus Green, attorneys for all of appellees, except Yazoo & Mississippi Railroad Co., on said motion.

STATEMENT OF CASE.

Appellant, the Illinois Central Railroad Company, a corporation and a citizen of the State of Illinois, filed its original bill in the circuit court of the United States for said district on August 4, 1898, against Wirt Adams, State Revenue Agent of the State of Mississippi; the Railroad Commission of the State of Mississippi, T. C. Kimbrough, clerk of said commission, and the Yazoo & Mississippi Valley Railroad Company,

a Mississippi corporation, domiciled in Mississippi, to enjoin said Railroad Commission, as State Railroad Assessors, from approving the assessment for taxation—State, county and municipal—made and ordered by the said commission on August 2nd, 1898, on the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co., for the years 1886 to 1891, inclusive; and to enjoin said Kimbrough, as such clerk, from certifying said assessment; and to enjoin said Wirt Adams, State Revenue Agent, from bringing any suit for the recovery of a judgment or decree against Yazoo & Miss. Valley R. R. Co., or for the enforcement of the lien for said taxes, or from taking any steps towards the subjection of said property to said taxes.

A fiat for an injunction was granted, *ex parte,* by the district judge, and an injunction was issued, and which by common consent was treated as a restraining order. A motion for injunction was made by appellant upon the bill, and a counter motion to discharge the restraining order was made by all of the appellees, except Yazoo & Miss. Valley R. R. Co.

These motions were heard in January, 1899, and upon the bill and evidence, the circuit court discharged the restraining order and refused to grant an injunction. From this interlocutory decree an appeal was taken to the United States circuit court of appeals, and that court, *of its own motion,* after hearing the merits, dismissed the appeal. Thereupon,

solely because the injunction had been refused, on motion of all appellees, save Yazoo & Miss. Valley R. R. Co., the bill was dismissed. Thereupon, under the first paragraph of Sec. 5, of the judiciary act of 1891, an appeal was taken to this court, upon certificate of the question of jurisdiction. Appelles, save Yazoo & Miss. Valley R. R. Co., move to dismiss or affirm.

The bill predicated the right of appellant, on its own behalf, to invoke the jurisdiction of the court to enjoin the approval of the asssessment in process of being made by the State Railroad Commission, and the bringing of a suit upon such assessment, when approved, by the State Revenue Agent, to recover the taxes so assessed, against Yazoo & Miss. Valley R. R. Co., and the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co. upon these grounds.

1. That appellant was *a stockholder* of the Miss. Valley Company, a Mississippi corporation, and that the *Miss. Valley Company* was a *stockholder* in Louisville, New Orleans & Texas Ry. Co., with which the Yazoo & Miss. Valley R. R. Co., both Mississippi corporations, formed, by consolidation in 1892, the Yazoo & Miss. Valley R. R. Co., one of the defendants to the bill; that in 1890, said Louisville, New Orleans & Texas Ry. Co. had acquired by purchase, the property and franchises, privileges and immunities of the Natchez, Jackson & Colum-

bus R. R. Co. sought to be taxed by said asssessment and said suit. Par. xii., R. 17.; Par. ix., R. 12,13; Par. xiv. R. 19.

2. That appellant, in 1892, as mortgagee, became a *bona fide* purchaser for value and without notice of said property so sought to be assessed. Par. xiii., R. 9.

The gravamen of the bill was:

1. That since the organization of the State there had been a settled public policy to confer upon corporations chartered for public improvements exemption from taxation. That Art. xii., Sec. 13, of the Constitution of 1869, provides: "The property of all corporations, for pecuniary profits, shall be subject to taxation, the same as that of individuals;" and, "Section 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." That in 1870, the legislature enacted the 21st section of the charter of Mobile & Northwestern R. R. Co., which is set forth in the record, page 5, and that this 21st section was extended to Natchez, Jackson & Columbus R. R. Co. by the amendment to its charter of August 8th, 1870. That in 1872 there was an act passed entitled "An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi." (Said act is similar to said 21st section, except that it is a general act applicable to all of the class of factories, individual and corporate, and contains no irrepealable clause, and there

are other differences apparent upon inspection); the said act of 1872 is found in the record on page 7. This act of 1872, as amended in 1873, was amended in 1877 "so as not to exempt from taxation * * * any property of any manufactory" other than the capital stock, factory proper and manufactured goods. That Mississippi Mills, a manufacturing corporation, after the passage of the said act of 1877, filed its bill claiming that said act of 1877 "and the things about to be done under it, impaired the obligation of its charter contract," and prayed injunction against the tax collector restraining the enforcement of said act of 1877; that the State Supreme Court in that case (Miss. Mills vs. Cook, 56 Miss., 40) declared the rule of interpretation of said constitution of 1869. "to-wit: That the words of said section 13, article xii of said constitution aforesaid, did not require any legislature to tax the property of corporations for pecuniary profits, and that the words shall be subject to did not mean subjected to; or, in other words, that said provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but that such property shall ever be subject to, i. e. liable—to be taxed, if the legislature so will." R. 8. That this interpretation has been followed by the Supreme Court of the State in many cases since April, 1878, and has been for twenty years the settled law and rule of property of that State, and has been adopted and acted upon by the legislature, executive and judicial de-

partments of the State, and that upon this rule of property appellant acted in making its investments and contracts herein mentioned. That many kinds of property were exempted from taxation in each of the revised codes; and in the code of 1892, by Sec. 3744, "all permanent factories hereafter established in this State," etc., were exempt from taxation. That by the acts of 1884, Chap. 22, and acts of 1890, Chap. 2, all railroads in process of construction were exempted from taxation. That by the acts requiring railroad companies to file schedules of their property with the railroad commission, "who were authorized to asssess the same for taxation, where the law provided for it," it was provided "if any of said property is claimed to be exempt from taxation, it shall be separately stated and the law cited under which the exemption is made;" "and said commission was to assess for taxation such property owned as was liable for taxation under the existing laws;" and that the constitution of 1890, by Sec. 181, provided: "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the general laws, unless sooner repealed by the legislature." Par. v., R. 9.

That Natchez, Jackson & Columbus R. R. Co. was chartered July 20, 1870, and the said 21st section of the charter of Mobile & Northwestern R. R. Co. was extended to it by act

of August 8, 1870, and that that company accepted the charter so amended. That complainant is not informed if any work was done prior to the said decision in Miss Mills vs. Cook, but that it was not until 1879 that the road was finished to Martin—forty-three miles—and not until September, 1881, that it was extended from Martin to Miles, fifteen miles, and not until October, 1882, that said road was constructed and put in operation to Jackson. That Natchez, Jackson & Columbus R. R. Co. issued its capital stock for $2,028,000, and its $1,250,000 mortgage bonds in such construction. That said Natchez, Jackson & Columbus R. R. Co. incurred said liabilities on the faith of said 21st section, and said Miss. Mills decision. Par. vii., R. 10, 11. That Natchez, Jackson & Columbus R. R. Co. was never enabled to pay any dividend to its stockholders. R. 12. That in 1882 an act was passed entitled: "An act to authorize the Memphis & Vicksburg R. R. Co. and the Mississippi Vallley and Ship Island R. R. Co. to effect a consolidation," and this act was amended by the act of 1884 entitled, "An act to amend an act entitled 'An act to authorize the Memphis & Vicksburg R .R. Co. and the Mississippi Valley & Ship Island Railroad Companies to effect a consolidation, approved March 3rd, 1882." That said 21st section was section 5 of said act of 1882. That under said acts of 1882 and 1884 the Louisville, New Orleans & Texas Ry. Co. was formed by the consolidation of the Memphis & Vicksburg R. R. Co. and New

Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., both Mississippi corporations, and a Tennessee and a Louisiana corporation, and the said railroad from Memphis to New Orleans "was speedily constructed by the aforesaid constituent companies and by the consolidated company, in the years 1882, 1883 and 1884," and was completed December 1, 1884.

Par. viii., R. 12.

That in 1890 an act was passed authorizing Natchez, Jackson & Columbus R. R. Co. to sell to or consolidate with Louisville, New Orleans & Texas Ry. Co., all of its property, rights, powers, privileges and immunities. That when this act was passed the case of Miss. Mills vs. Cook "had been expressly followed, or its principle applied without express citation," in the later cases of McCulloch vs. Stone, 64 Miss., 378, decided in 1886; Railroad Co. vs. Thomas, 65 Miss., 553; decided in 1888, and Bank vs. Worrell, 67 Miss., 47, decided in 1889. That in McCulloch vs. Stone, 64 Miss., *supra*, this 21st section in the charter of Louisville, New Orleans & Texas Ry. Co. was under consideration, and while deciding that this privilege did not attach to outlying lands, that case did declare that it did attach to such property as was 'necessary to the construction, equipment, maintenance and operation of its road.' That in 1890 Natchez, Jackson & Columbus R. R. Co. had been in the enjoyment for twelve years of this privilege, openly and notoriously, and in the passage of said act of 1890

the legislature was aware of the said decisions of the State Supreme Court upon the validity of said 21st section, and by said act of 1890 it was intended to pass, by sale, the benefits of said 21st section. That in reliance upon said decisions in Miss. Mills case and the other cases named, and upon the futile efforts in 1886 and 1898 to repeal this privilege with others of like character, Louisville, New Orleans & Texas Ry. Co. in good faith, for value and without notice, purchased said property, rights, powers, franchises and immunities of Natchez, Jackson & Columbus R. R. Co., and issued therefor $800.000 of its first mortgage 4 per cent bonds secured by first mortgage on its entire line, and that these bonds are outstanding in the hands of *bona fide* purchasers, Par, viii, R. 13, 14. The deed of purchase is made E. A. to the bill. R. 35. That said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co., and the contracts whereby the same was vested in the Louisville, New Orleans & Texas Ry. Co. are valid contracts under the constitution and laws of the State of Mississippi, and as then expounded by the State Supreme Court, and could not be invalidated by any subsequent change of judicial decisions, nor could such subsequent decision "as to the constitutional power of the legislature to enact said act of incorpartion and grant said exemption, change or impair the rights of the parties under said charter contract, which was, as aforesaid, valid when made." That though said sev-

eral decisions denominate said 21st section an "exemption from taxation, the railroad companies have never accepted that view; but they deny that it is an exemption within said Sec. 13, Art. xii., Const. 1869. That said 21st section "is a contract of appropriation as aforesaid, whereby the legislature authorized a special and peculiar mode of paying taxes, and a special and peculiar method of granting aid to the construction of railroads, which is entirely other and different from an exemption, and is not and never was within the prohibition of section 13, Art. xii., aforesaid. The same is and was a contract within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract." That the difference between the two views has hitherto been immaterial as the legislature has refused to repeal the privilege. That said 21st section is irrepealable either by the legislature or subsequent judicial decision. That if said 21st section is regarded as an exemption, and within the operation of the constitution of 1869, the courts could not by subsequent decision change that which the constitution left to the legislature, and that this is what is sought to be done by the proceedings herein sought to be enjoined.

Par. x., R. 15-16.

That the power of the legislature to grant an exemption under the constitution of 1869 was affirmed in 1890 in Railway Co. vs. Taylor, 68 Miss., 361, and Attala Co. vs. Kelly, 68

Miss., 40; and that in the said Taylor case the court gave the Louisville, New Orleans & Texas Ry. Co. the benefit of this identical section 21. That by the constitution of 1890 it was, by Sec. 181, declared: "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals" 'there was then a special reservation of their existing rights to exemptions previously conferred. The section contains this language: Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution," etc., as recited *supra*. And by Sec. 279: "All rights, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation, shall continue," etc. That the constitution of 1890 intended to preserve the said immunity of said 21st section. That said Taylor case was decided in March, 1891, and thereby the court adjudged that said 21st section, as a part of the charter of the Louisville, New Orleans & Texas Ry. Co., was a benefit conferred upon said company to which it was legally entitled, and virtually a privilege continued by said constitution. That by implication this must also have thereby been adjudged as to the said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co. transferred under the act of 1890 to said Louisville, New Orleans & Texas Ry. Co. Par. xi., R. 16-17.

That appellant purchased $13,805,000 of the first mort-

gage bonds; $8,731,000 of the second mortgage bonds and $8,347,000 of the income third mortgage bonds of Louisville, New Orleans & Texas Ry., Co., in April 1892, upon the faith of said legislation, judicial decisions and the said Act of 1890, and thereby appellant acquired a lien as security upon the property, rights, powers, franchises and immunities, acquired by Louisville, New Orleans & Texas Ry. Co., R. 17-18.; and that appellant paid for said stock of Louisville, New Orleans & Texas Ry., Co., purchased by Miss. Valley Co., in April, 1892, and for said first, second and third mortgage bonds of Louisville, New Orleans & Texas Ry., Co., by its $20,000,000 mortgage bonds; R. 19., and that relying on the legislation and adjudications aforesaid, and the said constitutional provisions, and the action of the Legislature in refusing to repeal said 21st section, appellant executed its mortgage to secure an issue of $25,000,000 of bonds, of which said $20,000,000 was part. That said $1,250,000 bonds of N. J. & C. R. R. Co., and all of said first, second and third mortgage bonds so purchased, were placed in the hands of United States Trust Co., of New York, as collateral security for said total issue of $25,000,000 of the bonds of appellant. R. 19.

That on Oct. 24, 1892, Louisville, New Orleans & Texas Ry. Co., and the Yazoo & Mississippi Valley R. R. Co., (a Mississippi corporation, chartered in 1882) "pursuant to the authorities conferred upon them by their respective charters,'

effected a consolidation whereby the existence of said Louisville, New Orleans & Texas Ry. Co., was merged into that of Yazoo & Mississippi Valley R. R. Co., and all of the property, real and personal, and all of the rights, franchises, privileges and immunities of Louisville, New Orleans & Texas Ry. Co., were transferred to, and became those of Yazoo & Mississippi Valley R. R. Co. That said consolidation was effected on the faith of the adjudications and legislative and constitutional enactments "hereinbefore stated;" that said 21st Section was a material part of the contract of consolidation and its enjoyment was had in view by Yazoo & Mississippi Valley R. R. Co. The Articles of Consolidation are made Ex. C. to the bill. R. 43.

That after said consolidation of Oct. 24, 1892, the State Supreme Court, in Railroad *vs* Lambert, 70, Miss. 779, again passed upon said 21st Section as a part of the charter of Natchez, Jackson & Columbus R. R. Co., as passed to Louisville, New Orleans & Texas Ry. Co., by purchase in 1890, and to Yazoo & Miss. Valley R. R. Co., by the consilidation of 1892, and reaffirmed the doctrine of Miss. Mills *vs.* Cook, and held that said 21st section was valid and effectual; that it inured to Louisville, New Orleans & Texas Ry. Co., by the purchase in 1890, and to the Yazoo & Miss. Valley R. R. Co., by the consolidation of 1892; that appellant relying upon said decision and said previous decisions "hereinbefore stated," and upon the

Legislative and Constitutional provisions "hereinbefore set forth," and the refusal of the Legislature to interfere with said 21st Section by repeal, issued more of said series of $25,000,000 of bonds in and about the extension and improvement of said Louisville, New Orleans & Texas Ry. property.

Par. XIV, R. 19-20.

That the State Revenue Agent proceeding under Chap. 126, Code 1892, as amended by the Act of 1894, inaugurated and conducted certain suits against appellant and Yazoo & Miss. Valley R. R. Co., for the taxes assessed against the property that had been the property of Louisville, New Orleans & Texas Ry. Co., for the years 1892-1895 inclusive, "but not including any taxes upon the property that had formerly been property of Natchez, Jackson & Columbus R. R. Co." R 21. Avers it is unnecessary to set forth the scope of that litigation, but avers that "it is sufficient to say that on the 20th of June, 1898, the Supreme Court of this State rendered in such cause a decision wherein they held, amongst other things, that the Constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation, and it did, in express terms, overrule the Miss. Mills case aforesaid, and by necessary consequence overruled all subsequent cases holding the same doctrine, and did in express terms declare that the said Section 21, of the Mobile & Northwestern Railroad charter was unconstitutional and null and

void *ab initio.* That said decision overturns the former settled construction of the Constitution and Statutes of the State and the accepted rule in the departments of government, legislative, executive and judicial, and by the Constitution of 1890, on the faith of which the large pecuniary transactions hereinbefore set forth had been based. That such decision and action of the Supreme Court "when sought to be practically applied as it is now sought to be so applied by the defendents herein, as will be hereinafter shown, is subversive of the various contract rights and contract obligations hereinbefore set forth, and in which your orator is interested" and is in conflict with the Constitution of the United States, in that it impairs the obligation of said contracts, and deprives appellant of his property without due process of law and denies to appellant the equal protection of the laws

Par. xv. R. 20-1.

That relying on said "extraordinary and shocking" decision of June 20th, 1898, "the State Revenue Agent, proceeding under the claim of authority aforesaid, made application to the State Railroad Commission * * that they should proceed under the said law of 1894, and assess the property hereinbefore described, which had been the property of the Natchez, Jackson & Columbus Railroad Company, for back taxes for the years 1886, 1887, 1888, 1889, 1890 and 1891, and to assess such taxes against the Yazoo & Mississippi Railroad Company

as the owner at this time of said property, and against Natchez, Jackson and Columbus Railroad Company as the owner of the same during the years 1886 to 1890, inclusive. And proceeding under the request of the State Revenue Agent, as aforesaid, the said Railroad Commission did, on the first day of August, 1898, proceed to assess taxes against the said Yazoo & Mississippi Valley Railroad Company, as owner, and against the Natchez, Jackson & Columbus Railroad Company as owner, and against said property" at a certain rate per mile, specifying the rate, aggregating a total assessment of more than $50,000.

Par. xvi. R. 21-2.

That the said notice of the State Revenue Agent and the findings of the State Railroad Commission pursuant thereto, are made parts of the bill and Ex. D. thereto. Exhibit D. shows a notice by the State Revenue Agent to the State Railroad Commission, dated *Dec.* 31, 1897, informing the Commission that the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co., had escaped taxation during the years 1886, 1887, 1888, 1889, 1890 and 1891 because not assessed, and calling on the said Commission to assess the property for taxation, and to give notice to Yazoo & Mississippi Valley R. R. Co., and Natchez, Jackson & Columbus R. R. Co., R. 49-50.

The bill further avers that complainant does not

know whether or not said property was assessed, but if not, it was the fault of the State's officers; that it was the duty of the assessing officers under the Code of 1880 to assess railroads for taxation, and the failure to do so was because of the recognition of the exemption from taxation. That as there was no assessment when Louisville, New Orleans & Texas Ry. Co., purchased the property, it, as a *bona fide* purchaser, took discharged of the power to retroactively assess. R. 22-3.

Avers that by the said consolidation of 1892, Yazoo & Mississippi Valley R. R. Co. became a *bona fide* purchaser of said property, for value and without notice, and that this right is superior to that for said, then, unassessed taxes. R. 23. That such retroactive assessment would be an attempt to overreach the said contract of consolidation and purchase, and would impair the obligation of said contracts, and would deprive appellant of its property without due process of law, and would deny to it the equal protection of the laws. R. 23-4.

That Natchez, Jackson & Columbus R. R. Co. for 1886, 1887, 1888 and 1889, and Louisville, New Orleans and Texas Ry. Co., for 1890 and 1891, paid in each year the taxes which were assesable conformably to said 21st Section, and were entitled to the receipts from said tax-collectors, and would have made such affidavits and received such receipts, had the same been assessed conformably to law." That Natchez, Jackson, & Columbus R. R. and Louisville, New Orleans & Texas Ry

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Co., is now extinct, and if the said assessment of August first 1898, is allowed to stand, there are no officers in existence to make the affidavits required, and this without fault of the railroad companies, but wholly by the fault of the State Railroad assessors. That said 21st Section contemplated annual settlements and did not contemplate settlements ten or fifteen years after the year involved by retroactive assessment. R. 24-5.

The bill further avers the execution of the first, second and third, land grant income, mortgages, and bonds by Louisville, New Orleans & Texas Ry. Co., and they are made Exhibits E. F. and G., to the bill R. 25. Exhibit E. shows a mortgage to Union Trust Company, of New York, as trustee; R. 50. Exhibit F shows a mortgage to said Union Trust Company, as trustee; R. 63. Exhibit G. shows a mortgage to Edward H. Pardee and Albert Crolins, as trustees; R. 76. That the earnings have never sufficed to pay the interest on said second mortgage bonds, and nothing whatever of the interest on the said third mortgage bonds. R. 29.

That if the State Revenue Agent shall enforce the assessment now sought to be enjoined and also succeed in other like suits now pending, "such collections of said taxes will impair the obligation of the contract of purchase of said bonds, and deprive appellant of its property without due process of law and deny it equal protection of the laws, contrary to the Con-

stitution of the United States.

Par. xix. R. 29-30.

That said Taylor case is *res adjudicata* between Louisville New Orleans & Texas Ry. Co., and the State of Mississippi "as to the question of the legality and sufficiency of the privilege conferred by said Section 21, and of the constitutionality thereof, and of the right of Louisville, New Orleans & Texas Ry. Co. thereunder," and that Yazoo & Miss. Valley R. R. Co. "as its successor" would be entitled to the benefit thereof; and that being *res adjudicata* as to the State it was *res adjudicata* as to every county and municipality there of.

Par. xx. R. 30.

That said Lembert case is *res adjudicata* between Yazoo & Mississippi Valley R. R. Co., and the State "as to the sufficiency of said privilege conferred by Section 21 * * as imported into the charter of the Natchez, Jackson & Columbus R. R. Co., and its constitutionality," and, also, as to the right of enjoyment thereof by Yazoo & Mississippi Valley R. R. Co. since the sale 1890, and since the consolidation of 1892, and being *res adjudicata* as to Yazoo & Miss. Valley R. R. Co., it becomes such as to appellant, and that being *res adjudicata* against the State, it is also *res adjudicata* against every county and municipality.

Par. xxi. R. 31.

That the matters set forth in the bill create an estoppel

against the State Revenue Agent and the Railroad Commission from further prosecuting the proceedings of said assessment.

Par xxii. R. 31.

That the assessment of taxes when made as the said Railroad Commission "threatens to make the same" are required to be sent to the several clerks of the courts and to the municipalities, as a public record, and thereupon the tax collectors are required to proceed to collect the same by seizure and sale, if the same is not paid; that the Railroad Commission threatens to certify and send down said assessment, illegal though it be, to the several counties, and thereupon appellant is threatened with a multiplicity of suits. That the State Revenue Agent threatens in his legal capacity as representative of the State and said several counties and municipalities "to bring a suit for the recovery of the taxes so assessed." That for the prevention of a multiplicity of suits, this court, on its chancery side, should take jurisdiction by its writ of injunction and adjudicate the matters and questions here raised, both federal and equitable.

Par. xxiii., R. 32.

That said assessment "when made" would cast a cloud on title, and the equity jurisdiction is invoked to prevent this being done.

Par. xxiv., R. 32.

That payment under protest of the tax, and suits to recover back, would produce a multiplicity of suits, and because of the peculiar constitutions of municipalities and counties, and of recourse having to be had to legislative appropriation by the State to pay judgments, such procedure would be an inadequate remedy.

Par. xxv., R. 33.

The bill prays injunction restraining the said State Railroad Assessors from approving,and the said assessors and the clerk aforesaid from certifying the said assessment of taxes on the said railroad" formerly belonging to Natchez, Jackson & Columbus R. R. Co.," etc., "and, also, from approving or certifying said record of assessments and taxation, and from approving and certifying the valuation which they have fixed as such board of assessors aforesaid upon the said Natchez & Jackson railroad," and that Wirt Adams, State Revenue Agent shall be enjoined from beginning any suit for the recovery of any judgment or decree for said taxes, or to enforce the lien thereof, or from any proceedings looking to the subjection of said property to the payment of taxes for said years. That on final hearing said injunction be made perpetual; that the said property be decreed exempt "from State and county taxation" for said years, and that "the contract of exemption" of said 21st section by declared valid as to State, counties and municipalities for thirty years from its charter; that said as-

sessment be declared null and void and be cancelled as a cloud on the title of appellant.

R. 33-4.

A writ of injunction as prayed was issued. R. 87-8. But by consent it was treated as a restraining order.

Appellees, except Yazoo & Miss. Valley R. R. Co., moved to discharge the restraining order, because:

1st. That they have no authority to distrain or sell anything for taxes, and were merely performing duties imposed by law, and a suit against them, or any of them, is a suit against the State of Mississippi, and forbidden by the 11th amendment to the Constitution of the United States.

2nd. Said Railroad Commission, in making said assessments, act judicially and cannot be enjoined; that the State Revenue Agent cannot act until after the assessments are made, approved and the rolls sent to the various counties as required by law.

3rd. Said injunction was prematurely applied for.

4th. Plaintiff shows no right to file this bill under the 94th equity rule, or otherwise.

5th. The court has no jurisdiction.

6th. The bill shows no right to an injunction.

7th. There is no equity on the face of the bill. R. 89. Appellant moved for an injunction. R. 89. Evidence was adduced on the hearing of these motions.

The record of the State Railroad Commission was introduced and it showed personal service on Yazoo & Miss. Valley R. R. Co., and Natchez, Jackson & Columbus R. R. Co. R. 93, and that Yazoo and Miss. Valley R. R. Co. appeared and denied that the property was subject to assessment; and, if subject to assessment, that the assessment could be made against Yazoo & Miss. Valley R. R. Co.; it denied that the property escaped taxation for want of assessment; it averred that Natchez, Jackson & Columbus R. R. Co. and Louisville, New Orleans & Texas Ry. Co. were extinct; that if liable to be assessed for taxation that Yazoo & Miss. Valley R. R. Co. could not make the schedules. R. 93; and it objected to the proposed assessment. Because of section 21, extended to Natchez, Jackson & Columbus R. R. Co. by act of August 8, 1870; followed by the act of March 12, 1884 (Laws 1884, p. 29), and by the act of February 19, 1890. (Laws 1890, p. 675.) And because said act of 1890 was carried out by a sale of said railroad to the Louisville, New Orleans & Texas R. R. Co., as authorized.

And because in 1892 said Louisville, New Orleans & Texas Ry. Co. and Yazoo & Miss. Valley R. R. Co. were consolidated as authorized by their respective charters.

And because the payments required by the 21st section were annually made ,and the affidavits required thereby regularly made, and delivered to the tax collectors, and receipts

for said taxes received conformably to law.

Because said railroad has never been enabled to declare the dividend provided in said 21st section.

Because by Lambert's case the entire question has been judicially determined in favor of said company, and is *res adjudicata* of these matters.

R. 94.

The Railroad Commission overruled defendant's objection, and after hearing the evidence, it adjudged that the property of Natchez, Jackson & Columbus had escaped taxation from 1886 to 1891 inclusive, by reason of not being assessed, and that it be assessed at the amounts set opposite on the assessments rolls etc., "and on demand of said Yazoo & Mississippi Railroad Company by its attorney, it is ordered that said assessments so made, remain on file for thirty days for the filing of objections thereto." R. 95. No objections were ever filed. Ctf. Clk. R. 97.

The record in Miss. Mills vs. Cook, was read in evidence; the bill only is transcribed, but by agreement, R. 90, it is shown that the bill was demurred to, the demurrer was sustained March 12, 1878—incorrectly stated 1873—and appeal taken; and that the rest of the record may be taken from the 56 Miss. Report 40; and that the case was decided on appeal at the April term 1878. That bill averred that in 1872 the Legislature had declared "by a general law," passed in order to invite

and stimulate manufacturing enterprises in the State and to diversify and multiply its industries, that the State "hereby agrees with any and all maufacturing companies in this State * * * that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the payment to the debts and liabilities which any of said companies may have incurred in the constuction of factories," etc., and following generally the terms of said 21st section as to payment by affidavit. That said Miss. Mills had accepted said act as amended by the act of 1873, and on the faith thereof had constructed its factory. That said mills owned outlaying lands, though not by way of investment. That the act of 1877 repealed said acts of 1872 and 1873 as to all property except the mill proper, its site, buildings, stock and machinery. That the tax collector, Cook, was willing to accept the affidavit in payment of the taxes on the mill proper, its site, etc., but refused to accept the affidavit for the taxes on these outlying lands. Avers that the repealing act of 1877 impaired the obligation of complainants contract in violation of the Federal Constitution. Prays, injunction against the collection of the taxes on these outlying lands. A general demurrer to this bill was sustained, March 12, 1878. The Miss. Mills appealed, and at the April term, 1878, of the State supreme court the decree sustaining the demurrer was affirmed.

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R. 101-107. R. 90, 56 Miss., Rep. 40.

The record in Lambert's case was read in evidence. The bill in that case was filed by Natchez, Jackson & Columbus R. R. Co., as a "going" concern, joining Yazoo & Miss. Valley R. R. R. Co., as grantee, as complainant against Lambert, sheriff of Adams county, seeking to restrain by injunction the State and county taxes of 1891 and 1892 upon that part of the property of Natchez, Jackson & Columbus R. R. in Adams county, upon the ground; that by said act of Aug. 8, 1870, said 21st section was extended to Natchez, Jackson & Columbus R. R. Co., and that said charter was amended by the act of March 5, 1878, and by it, also, the benefits of said 21st section were conferred, and that this 21st section was a contract "irrepealable and inviolable." That Natchez, Jackson & Columbus R. R. Co., on the faith of these acts invested its funds in and constructed its railroad from Natchez to Jackson, and since its construction has employed its capital in the operation and maintenance thereof relying upon said contract, and reposing in the belief" that the taxes to which it was subject, would be appropriated by the State of Mississippi to the payment of its debts and liabilities incurred in the construction of said railroad, and as provided for by said 21st section, R. 113, and that "said contract and agreement on the part of the State of Mississippi, went far beyond the mere privilege of an exemption from taxation, the State having solemnly agreed in said

contract "and by the acts of the legislature aforesaid, that if said company should construct a railroad as provided for in its charter and amendments thereto and should incur debts and liabilities, in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight *per cent.* upon its capital stock over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of incorporation, in 1870, should be appropriated by the State of Mississippi to the payment of the debts and liabilities incurred by the company in building said road;" R. 113, and that by a sale of its property, rights franchises, privileges and immunities under the act of 1890 said immunity from taxation passed to the purchaser, Louisville, New Orleans & Texas Ry. Co.; and that by said consolidation of Oct. 25, 1892, said immunity from taxation passed to Yazoo & Miss. Valley R. R. Co.; that on Oct. 25, 1892 'the Louisville, New Orleans & Texas Ry. Co., was merged into and consolidated with the Yazoo & Miss. Valley R R. Co., and that by said merger and consolidation the capital stock, franchises, grants, privileges and immunities * * * * of Louisville, New Orleans & Texas Ry. Co., *was* merged into and became the property of Yazoo & Mississippi Valley Railroad Company:" R. 113-4; that the franchise to be a corporation did not pass by said sale under the act of 1890, and that since that sale Natchez, Jackson & Columbus R. R. Co. has preserved its

organization, had meetings of stockholders and directors, and was a going corporation; that the amount of said taxes for 1891 and 1892 had been applied by Natchez, Jackson & Columbus R. R. Co., to the debts of construction of Natchez, Jackson & Columbus R. R. Co.; that the tax collector refused to accept the affidavit of either Natchez, Jackson & Columbus R. R. Co., or Louisville, New Orleans & Texas Ry. Co. (Yazoo & Miss. Valley R. R. Co.) in payment of said taxes; and prays injunction. Ex. D. and E. to this bill are affidavits of Cooke, Pres't of Natchez, Jackson & Columbus R. R. Co., stating that in 1891 and in 1892 said Natchez, Jackson & Columbus R. R. Co, had applied the amount of the taxes in each year to its debts of construction; the affidavits conforming to said 21st section. R. 119, 123. Also like affidavits of Pres't of Louisville, New Orleans & Texas Ry. Co. R. 120, 124.

The bill was demurred to, R. 127, the demurrer sustained March 23, 1893. R. 91. There was, also a plea of *res adjudicata* supported by a record wherein Louisville, New Orleans & Texas Ry. Co., as complainant, had sought to enjoin said Lambert from subjecting its property acquired from Natchez, Jackson & Columbus R. R. Co., to the payment of State and county taxes upon substantially the same averments as in the bill of Natchez, Jackson & Columbus R. R. Co., vs. Lambert, *supra* except that it was averred that the taxes had been paid for 1891 by the proper affidavit by the officers of Louisville,

New Orleans & Texas Ry. Co. of the application of the amount of said taxes on the debts of construction of the said Louisville, New Orleans & Texas Ry. Co. R. 90-1. That an appeal was taken in said Lambert case to the Supreme Court returnable April 17, 1893, and the case was decided at the April term, 1893, of said court. It was agreed that the rest of said record might be taken from 70 Miss. 779. R. 91. The Supreme Court reversed the decree sustaining the demurrer, and held the plea of *res adjudicata* not good, and remanded the cause for answer.

It was agreed that copies of the decision of the Supreme Court of Mississippi rendered on June 20, 1898, and November 22, 1898 in "Wirt Adams, vs. Yazoo & Miss. Valley R. R. Co. et al.," may be used from the pamphlets "Mississippi Decisions" and need not be copied. This case with the opinions is now in this court being No. 244 on the docket of this October term, 1899 of this court. R. 90.

Upon the hearing of the motions to discharge and for injunction the Circuit Court "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction" it by interlocutory decree refused to grant the injunction, and discharged the restraining order. R. 128.

Thereupon appellant appealed from said interlocutory decree to the United States Circuit Court of appeals, fifth cir-

cuit, and assigned for error. 1. Because "on the bill and proofs" the restraining order should not have been discharged: 2. Because "on the bill and proofs" the temporary injunction should have been granted. R. 129.

The court of appeals after a full hearing on the merits, of its own motion, dismissed the appeal for want of jurisdiction. 93 Fed. 852.

Thereupon appellees, except Yazoo & Miss. Valley R. R. Co., entered a special appearance, and moved to dismiss the bill, solely because the injunction had been refused, and the appeal for that decree had been by the court of appeals dismissed for want of jurisdiction, and this motion was sustained and the bill was dismissed. R. 133.

Thereupon appellant prayed an appeal to this court because of said decree refusing jurisdiction, under Section 5, of the Judiciary Act of March 3, 1891; and assigned for error, that the court erred in dismissing the bill "for want of jurisdiction to entertain the same." R. 134. Thereupon the district judge certified, after reciting meagerly the record, as follows: "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

1. That the complainant in its original bill showed no jurisdiction on the ground of the diversity of citizenship. Defendants claim that complainants' interest was derivative

through the Yazoo & Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Yazoo and Mississippi Valley Railroad Co. a party defendent in the cause.

2. That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

3. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the 11th amendment to the Constitution of the United States.

The court having dismissed the bill on the ground of want of jurisdiction, the foregoing three questions, arising upon the pleading, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision in c nformity with the fifth section of the act of Congress of the year 1891." R. 140.

After the dissolution of the injunction, Wirt Adams, State Revenue Agent, brought suit in the Chancery Court of Hinds County, State of Mississippi, to enforce the lien of the taxes upon said assessment against the property assessed to which suit Yazoo & Mississippi Valley R. R. Co. and Illinois Central Railroad Company were parties defendant and they appeared and defended by answer, and such proceedings were had that a final decree on the merits was made by said court enforcing

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the lien of the taxes upon the property assessed but not *in personam* except as to costs on the day of February, 1900, and that decree stands unreversed, and is set up herein by affidavit as *res adjudicata* of this appeal.

Appellees, except Yazoo & Mississippi Valley Railroad Company, move the court to dismiss or affirm.

BRIEF.

I.

JURISDICTION.

This appeal was taken under paragraph 1, of the fifth section of the Judiciary Act of 1891. R. 134, 140. The certificate of the question of jurisdiction, R. 140, recites "that the question of the jurisdiction of this court was in issue in said cause * * namely:

1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship, * * *.

2. That the complainant by its orignial bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

3. That there was no jurisdiction in this matter because

the bill was a suit against the State of Mississippi in violation of the eleventh amendment to the Constitution of the United States. The court having dismissed the bill on the ground of the want of jurisdiction, the foregoing three questions, arising upon the pleadings, the process and the evidence, are hereby certified to the Supreme Court," etc.

This appeal should be dismissed because:

1. This certificate is fatally defective, in that;

(*a*). It does not explicity state the question of Federal jurisdiction actually decided, if any, by the circuit court. It leaves the court to search through the record for the federal question decided, if any, and thereby seeks to convert an appeal by *certificate* into a general appeal. Such a certificate is fatally defective.

Maynard vs. *Hecht,* 151, U. S., 326-7-8.

(*b*). Said certificate does not state that the court decided the case on the question of the jurisdiction of the court as a Federal Court. It states that questions of jurisdiction were in issue, and that the bill was dismissed for want of jurisdiction, and that these three questions are certified for decision. The first question is one of jurisdiction because of diversity of citizenship. The circuit court of appeals has final jurisdiction of that question.

American Const. Co. vs. *Jacksonville, etc., Ry Co.*, 148, U. S., 372.

Press Pub. Co. vs. *Monroe,* 164, U. S., 105.

Benjamin vs. *New Orleans,* 169, U. S. 161.

And this even though, as here, by the third question certified, the defendent invokes the constitution and laws of the United States.

Press Pub. Co. vs. *Monroe,* 164, U. S., supra.

Boogmeyer vs. *Idler,* 159, U. S., 408

The second of the three questions certified is that there was no jurisdiction of the subject matter of the bill "inasmuch as the bill set forth no proper Federal question." The essential thing, as a predicate for the jurisdiction of this court by certificate under paragraph 1, is omitted from this certificate, viz: that the decision of the court was based upon the question of jurisdiction of the court as a Federal court. "No proper Federal question" conveys no definite idea of what Federal questions, if any, mere in issue; whether they were those arising under the constitution and laws of the United States, and, therefore, excluded from the terms of this certificate by paragraphs 4 and 6 of said Section 5, of said acts; or whether the pleadings defectively stated the cause of action in its Federal aspect; or whether the court was of opinion that there was no equity on the face of the bill, and, therefore, the Federal questions averred were not "proper" for decision under the case stated—whatever may have been in the mind of the court the certificate fails to specify it.

The third question certified arose on the defendants' objection to the jurisdiction as being a suit against the State contrary to the 11th amendment. So far as the question of jurisdiction is concerned this, being a defense, could not avail to make the question one for decision upon certificate by this court, but in such case the jurisdiction would pertain to the appellate jurisdiction of the court of appeals.

Press Pub. Co. vs. *Monroe,* 164, U. S., supra.

Boogmeyer vs. *Idler,* 159, U. S., supra.

Hence, *upon its face* the certificate is fatally defective.

2. The interlocutory decree of the circuit court refusing the injunction and discharging the restraining order "finds that the complainant has shown no right to invoke the jurisdiction of this court and further being of opinion that this court has no jurisdiction," etc. R. 128. The motion to dismiss the bill was *solely* because the injunction had been refused. R. 133. This finding was dual. It was primarily a finding that the complainant had shown no cause of action entitling it to invoke the extraordinary writ of injunction from a court of equity; and, further, that is, secondarily, " being of opinion that the court has no jurisdiction." The first or primary finding of this decree, viz: that the complainant has shown no right to invoke the jurisdiction necessarily assumes the exercise of the jurisdiction or powers of the court as a predicate for that finding. The denial was not because the court

had no power to grant the relief; but because, with all power in the premises, the complainant had not made out such a case as would entitle it to invoke the power or jurisdiction of the court. In other words, there was a want of equity. The secondary or further expression of opinion that the court had no jurisdiction supplements the first finding by the declaration that the court has no jurisdiction. Succintly stated the court says to the complainant: on the case stated you are not entitled to relief, and this without regard to jurisdiction; but if you have made out a case, then, the court, further, finds that it has no jurisdiction. Thus, it is clear from the decree itself that the injunction was refused because the court, as a court of equity, decreed that the complainant, aside from any question of jurisdiction of the court as a Federal court over the subject matter or the parties, had not made such a case as entitled it to relief under the principles of equity jurisprudence.

Where the ground of the decision was not rested upon the question of the jurisdiction of the Federal Court as a Federal Court, but upon the jurisdiction of the court as a court of equity, this court has no jurisdiction.

Smith vs. *McKay*, 161, U. S., 355.

Blythe vs. *Hinckley*, 173, U. S., 501.

Third St &c vs. *Lewis*, 173, U. S., 460.

U. S. vs. *Swan*, 65, Fed., 649.

Worlds Columbia. Ex. vs. U. S., 56, Fed., 654.

There were numerous questions of general equity jurisprudence involved: 1. Whether the complainant, a third person, could enjoin a court of competent jurisdiction, with jurisdiction of the parties, in process of trying a cause, from rendering a judgment or decree, against the party upon the facts of the case so found. 2. Whether a stockholder, as such, could assert the alleged right of the corporation, without averment of fraud or refusal of the corporation to protect its own interests. 3. Whether a mortgagee is not bound by an assessment of taxes made upon notice to the mortgagor, and whether as *bona fide* purchaser such mortgagee has any right superior to that of the mortgagor. 4. Whether such privity between complainant and Yazoo & Miss. Valley R. R. Co., existed as made the exclusive remedy of complainant against said assessment, when made, that of certiorari. 5. Whether the judgment of said Railroad Commission was not *res adjudicata* of the matters of said alleged exemption. 6. Whether the benefits of said 21st section, if then unrepealed, passed to Louisville, New Orleans & Texas Ry. Co., under the deed authorized by the Act of 1890, and whether the Lambert case was *res adjudicata* of that proposition. 7. Whether, if there was any difference, the Lambert case was not *res adjudicata* of the interpretation of 21st section being an exemption from taxation and not a contract of appropriation as averred. 8. Whether there was any conisideration for the grant of the said

21st section. 9. Whether the benefits of said 21st section were not lost under the operation of Section 180, of the Constitution of 1890 by the consolidation of Louisville, New Orleans & Texas Ry Co., and Yazoo & Miss. Valley R. R. Co., in 1892, under the powers of consolidation contained in their respective charters granted prior to 1890. 10. Whether under the Constitution of 1869, Sections 5, 13, 14 and 20, the grant of said 21st Section was not unconstitutional and void *ab initio*. 11. Whetherthe amount of the taxes had been paid by the payment of construction debts. 12. Whether the assessment would create a cloud on title, or avoid a multiplicity of suits, and whether the remedy at law was not clear and adequate. 13. Whether according to the express terms of said 21st section it was not necessary to make an assessment of the property before the right to pay by the affidavit of payment of construction debts could arise, etc., etc.

3. Aside from the diversity of citizenship averred, the sole basis for jurisdiction in the court as a Federal Court relied on was that said 21st section was a contract within the protection of the Federal Constitution, and that said decision of June 20, 1898, by the Supreme Court of Mississippi (the style of the case is not given, but, in fact, it was the case of Yazoo & Miss. Valley R. R. Co. vs. Adams, State Revenue Agent, No. 244, on the docket of October term, 1899, of this court) had held "amongst other things" that the constitution of

1869 meant that all property of corporations for pecuniary profits should be subjected to taxation and thereby overruled the previous decision of Miss. Mills vs. Cook and other cases construing said 21st section, and thereby overturned the settled construction of said 21st section, upon which appellant and those through whom it claims had acted and made the contracts of purchase and mortgage set forth in the bill; and that by this assessment sought to be enjoined the Railroad Commission and the Revenue Agent by the threatened suit upon said assessment were seeking to give effect to said decision in violation of the Federal Constitution. R. 21. Thus, the gravamen of complaint in respect to Federal questions was that rights guaranteed under the Constitution of the United States were being denied. Such cases do not come within paragraph one of Section 5 of the Judiciary Act of 1891, but are expressly provided for by paragraphs four and six thereof; and, hence, the remedy by appeal upon certificate of jurisdiction does not apply. That Federal Courts have jurisdiction of questions arising under the Constitution and laws of the United States is a question too plain to ever arise for decision. But the question of whether or not a right asserted is denied in violation of the Federal Constitution is one of interpretation of the right asserted in its relation to the Federal Constitution, and is not a question of the jurisdiction of the Federal Court.

Paragraphs four and six of Section 5, would exclude questions arising under the constitution and laws of the United States from being embraced in paragraph one. *Expressio unius, exclusio alterius.*

4. The jurisdiction pertained to the court of appeals under Sec. 6 of said judiciary act of 1891 to finally decide all questions of equity jurisdiction proper. This jurisdiction applied to appeals from interlocutory decrees granting or refusing injunctions.

Smith vs. *McKay*, 161, U. S., 357-8.

5. If the jurisdiction of the court is involved the party "must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the circuit court of appeals on the whole case. If the latter then the circuit court of appeals may, if it deems proper, certify the question of jurisdiction.

McLish vs. *Roff*, 141, U. S., 661.

Maynard vs. *Hecht*, 151, U. S., 324.

U. S. vs. Jahn, 155, U. S., 109.

In re Lehigh Co., 156, U. S., 326.

Calvin vs. *City of Jacksonville*, 157 U. S., 368.

Both remedies, an appeal to the circuit court of appeals from the interlocutory decree, and an appeal from the circuit court from the final decree, are not available, because the whole appelate jurisdiction is distributed between this court and the

court of appeals.

United States vs. *Rider,* 163 U. S., 132.

Bardes vs. *First National Bank,* MSS. op. Dec. 22, 1899.

6. By the appeal to the circuit court of appeals from the interlocutory decree refusing the injunction and discharging the restraining order jurisdiction of the "whole case" was vested in that court; because,

a. The interlocutory decree was essentially a final decree; i. e., only the questions involved in the decree upon the interlocutory decree were or could have been presented and decided by the final decree.

Smith vs. *Walker,* 57 Mich., 456.

Toledo vs. *Detroit,* 61 Mich. 9.

Englewood Con. Co. vs. *Chicago R. R. Co.,* 117 Ill., 611.

(b) The merits of the *whole case* "on bill and proofs" were drawn in review by the assignment of errors. R. 129. That court, after a full hearing, *of its own motion,* dismissed the appeal. 93, *Fed.* 852. Such appeal carried the *whole case* to that court upon the law and the facts.

Maynard vs. *Hecht,* 151 U. S., 326-7.

Lake Nat. Bank vs. *Walfeborough,* 78 Fed. 517.

(c) The record presents questions of general equity juris-

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prudence and of the application of the constitution and laws of the United States for decision, and these questions of equitable cognizance are *in limine*, and were actually decided in the finding that "the complainant has shown no right to invoke the jurisdiction of this court." R.128.

Maynard vs. *Hecht*, 151 U. S. 324.

Green vs. *Mills*, 69 Fed., 852.

Caler vs. *Granger Co.*, 74 Fed., 16.

Crabtree vs. *Madden*, 54 Fed., 426.

Rust vs. *United Waterworks Co.*, 70 Fed. 129.

City of Indianapolis vs. *Cen. Trust Co.*, 83 Fed. 529.

In Green vs. Mills, 69 Fed. *supra*, it was held, the Chief Justice delivering the opinion, that where the jurisdiction rested on a Federal question, viz: the validity of State laws challenged as violating the Federal Constitution; but, conceding the jurisdiction, the question at the threshold was one of equitable cognizance, the Circuit Court of Appeals had jurisdiction—and this whether the dismissal was on that ground or not.

In such case the Circuit Court of Appeals has jurisdiction of the *"whole case."*

Smith vs. *Vulcan Iron Works*, 165 U. S., 518.

Kirwan vs. *Murphy*, 170 U. S., 209.

Lake Nat. Bank vs. *Walfebrough*, 78, Fed. 517.

In the brief of opposite counsel in No. 320, p. 11, it is con-

ceded that the Circuit Court of Appeals had jurisdiction on that appeal of the whole case; but they argue because that court dismissed the appeal that court had no jurisdiction. In other words, that the erroneous decision of that court as to its jurisdiction could affect the decision of this court upon its own jurisdiction.

(d) The validity of the State statute, 21st section, must first be determined by a judicial construction of the Constitutions of 1869 and of 1890, and when this has been done, if found constitutional or valid, then the questions arising under the Federal Constitution might be involved, and in such case, jurisdiction rests with the Circuit Court of Appeals.

City of Indianapolis vs. *Cen. Trust Co.*, 83 Fed., 529.

1. The validity of said 21st section, under Art. XII., Secs. 13 and 20 of the Constitution of 1869 lies at the foundation of the case. Sec. 13 ordains: "The property of all corporations, for preliminary profits, shall be subject to taxation, the same as that of individuals." Sec. 20: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law" Said 21st section, enacted in 1870, purported to grant by *special* act to a *special* corporation an irrepealable immunity from taxation for thirty years, upon condition that its profits would not enable it to declare a dividend of 8 per cent. upon its capital stock, and that it would apply the amount of its taxes

annually upon its debts of construction.

Construing said Secs. 13 and 20 in the Constitutions of other States, this court has held that their proper interpretation is that the taxation of corporate property is mandatory upon the Legislature, and that special exemptions cannot be granted.

Louisville vs. *Palmes* 109 U. S., 248.

St. Louis vs. *Berry*, 113 U. S., 475.

Schurze vs. *Cook*, 148 U. S., 408.

Keokuk vs. *Missouri*, 152 U. S., 310-12.

This construction of the nature of the contract by this court would be followed on any appeal from a Federal court, no matter what construction of these sections of the Constitution might be made by the Sate court.

Gelfe vs. Dubuque, 4 Wall.

U. S. vs. *Morrison*, 4 Pet., 124.

Green vs. Neal, 6 Pet. 129.

Leffingwell vs. *Warren*, 2 Black, 509.

Citizens Sav. Bank vs. *Owensboro*, 173 U. S., 643.

Hence, so far as the jurisprudence of the Federal courts is concerned, it could not raise a federal question for the State court to abandon an erroneous construction of its own constitution and to conform to the interpretation adopted by the Supreme Court of the United States. It is complained in the bill that the State Supreme Court "*amongst other things*," de-

cided, by its decision in Yazoo & Mississippi Valley R. R. *et al*, vs. Wirt Adams, State Revenue Agent, No. 244 on the docket of this court, that the constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation," etc. R. 21. An appeal to this court *at any time* from a Federal court of the State, would have met the same decision from this court as that delivered by the Supreme court of Mississippi, June 20, 1898, on this question.

It is to be carefully noted that the bill in this most essential feature is not as precise in its allegations of the nature of the decision in Yazoo & Mississippi Valley R. R. Co., vs. Adams, said No. 244, as it should have been to have put the court in possession of all of the decision of the State Supreme Court. The bill specifically averred that Mills vs. Cook was an interpretation of Section 13, Art. XII of Const. 1869, R. 8, and that these other cases had followed Mills vs. Cook. But it failed to aver that the decision of June 20, 1898, said No. 244, was an interpretation of Secs. 13 and 20, of the Constitution of 1869; hence in paragraph XV, p. 21, the pleader avers that the court held that the Constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation, etc. The effect of Section 20 on Section 13 had never been decided in a case of a special, irrepealable, exemption to a special corporation in any of the cases relied on and this was an essential part of that decision as shown by the opinion delivered in Nov. 1898 in that

case. One of the things decided "amongs other things," was that the said 21st Section was unconstitutional because expressly made *irrepealable* in violation of Secs. 13 and 20, Const. 1869. Mills vs. Cook contained no irrepealable clause; on the contrary the sole question for decision there was whether the Act of 1877 repealing in part the Acts of 1872 and 1873 was not unconstitutional, and the court decided that the repealing act was constitutional. In fact, the bill avers that all exemptions were repealable. R. 13.

Therefore, the question arising under the Constitution of 1869, in force when said 21st Section was extended to Natchez, Jackson & Columbus R. R. Co., Aug. 8, 1870, must be first decided before any Federal question can arise. For, if unconstitutional under the State constitution, on Federal question could arise.

2. While the bill avers that there was no repealing statute of the said 21st Section the court will take judicial notice of the statutes of the State, and, even of charters, Unity vs. Burrage, 103 U. S., 447, and it will find that the said 21st Section, being an amendment to the charter of Natchez, Jackson & Columbus Railroad company, was repealed by chapter 42, Acts of 1875, p. 66, as was expressly held in Lamberts case, 70 Miss., 779; and that by the Act of 1878, chap. 116, p. 233, said exemption was sought to be restored; and it was so held in Lambert's case, but the court overlooked the Act of 1878, chap. 11, p. 87,

amending said Act of 1875, and imposing taxes on railroad property as a class, and did not there consider or decide the effect of said chap. 11, approved the same day as chap. 116, upon chap. 116 under Sec. 20, Art. XII of the Constitution of 1869. These questions were considered and decided by the state chancery court in the decree set up in the affidavit herein, and the court there held that said chapter 11 repealed said chapter 116, and that said chapter 116 was unconstitutional under the Constitution of 1869, and especially so because of the enactment of said chapter 11. Said 21st Section was repealed by the Code of 1880, chap. 10, as was held in Lamberts case and by said chancery court. It was held in Lamberts case that the exemption was restored by chapter 22, Acts of 1884, p. 29. This was doubted in said No. 244, and, also, by said chancery decree but neither the Lambert case nor No. 244 interpreted said Act of 1884 in its relation to the Constitution of 1869 but by said chancery decree it was adjudged that if the exemption was re-enacted thereby, that such statute violated the constitution of 1869. If existent it was repealed by the Act of 1886, chapter 2, page 23 as was decided by said No. 244 and by said chancery decree. It was said in Lamberts case that chap. 2, Acts 1890, p. 12, recognized said exemption and by said chancery decree it was held that by chap. 2, Acts 1890, the said exemption, if then existent, was repealed, and that if it be said that it was recognized thereby that such recognition violated

said Constitution of 1869. So, the question of the existence or not of the exemption from 1886 to 1891 and whether repealable and repealed, or not, under the Constitution of the State, must be first determined. For, if repealable, notwithstanding the irrepealable declaration of its terms, under Secs. 13 and 20 of the Constitution of 1869, and, if in fact it was repealed, no Federal question could arise.

In Lamberts case, so much relied on by the bill as *res adjudicata*, it was expressly held that said 21st Section was an exemption from taxation; that it was repealable; that this exemption had twice been repealed, and that it was re-enacted as an exemption by the said Act of 1884.

3. The bill avers that said 21st Section was not an exemption but a contract of appropriation whereby the State agreed to appropriate an amount equal to the amount of taxes out of the State treasury and to pay the amount upon the debts of construction of the railroad company, the company acting as paymaster for the State; that this was a special and peculiar mode of paying taxes.

The very object of Secs 13 and 20, Art. XII, Const., and Secs. 181 and 112 Const. 1890, was to prevent *special* and *peculiar* modes of paying taxes. Sec 13 declared that corporate property shall be subject to taxation the *same* as that of individuals; Sec. 181 declared to the *same extent* as that of individuals; and Secs. 20 and 112 that taxation must be equal

and uniform; and Secs. 5, Const. 1869 provides: "The credit of the State shall not be pledged or loaned in aid of any person, association, or corporation;" and Sec. 14 provides: "The legislature shall never authorize any county, city or town, to become a stockholder in or lend its credit to any company, association or corporation, unless two-thirds of the qualified voters * * shall assent thereto. Whether the alleged special and peculiar mode of paying taxes by an alleged appropriation of the amount of the taxes—State and county and municipal—by the State to the debts of construction of the railroad company was not a violation of each of these provisions of the State Constitution must be first determined, for, if violative of the State constitution, no Federal question could arise.

These questions of construction of the State statutes and constitution at the foundation of the right asserted, and which must be first determined before the exigency for the decision of a Federal question could arise, vested jurisdiction of the "whole case" in the Circuit Court of Appeals.

(e) By the appeal to the Circuit Court of Appeals from said interlocutory, really final, decree, the appellant *made an election* within the meaning of the statute to invoke the jurisdiction of that court upon the "whole case," and it cannot now resort to this certificate of the question of jurisdiction.

McLish vs. Roff, 141 U. S. 668.

Maynard vs. *Hecht*, 151 U. S., 326.

Smith vs. *Vulcan Iron Works,* 165 U. S. 518.

Kirwan vs. *Murphy,* 170 U. S. 209.

(f) With the "whole case" before it if the Court of Appeals deemed the question of jurisdiction a controlling one, that court should have suspended the proceedings until that question could have been certified to this court for instructions.

U. S. vs. *Jahn,* 155 U. S. 109, 114.

New Orleans vs. *Benjamin,* 153 U. S. 411.

As the Circuit Court of Appeals did not so certify, but, of *its own motion,* dismissed the appeal for want of jurisdiction and thereby defeated appellant's election, the remedy of appellant was by *certiorari* from this court to the Circuit Court of Appeals.

Law Ow Bew vs. U. S., 144 U. S. 57.

(g) Even though this decree of the Circuit Court of Appeals is erroneous on the question of jurisdiction, after the term it is unassailable.

Gaines vs. *Rugg,* 148 U. S., 241.

(h) This appeal from the circuit court on certificate of jurisdiction is essentially a collateral attack upon the decree of the circuit court reversed on appeal to the Circuit Court of Appeals.

Dowell vs. *Applegate,* 152 U. S. 327.

Franklin vs. *German Bank,* 142 U. S. 93.

The legal effect of the decree of the Circuit Court of Ap-

peals dismissing the appeal was to leave adjudged every question involved in the decree of the circuit court within the appellate jurisdiction of the Court of Appeals presented by the record. And, also, it adjudged that the Court of Appeals did not elect to certify the question of jurisdiction to this court. These questions thus became *res adjudicata,* and cannot be reversed or annulled by attempting to reverse the original decree of the circuit court by this appeal. The decree of the circuit court is conclusively protected from attack by appeal by the decree of the Circuit Court of Appeals. That decree, if any, is the only decree to be assailed by appellate proceedings from this court.

7. In Taylor vs. L. & N. R. R. Co., 31, C. C. A., 537 much relied on by appellant in the court below, the circuit court took jurisdiction as a court of equity to enjoin the certificate of the assessment roll because of a systematic, fraudulent increase by the Railroad Assessors; the equities involved were: 1. Avoidance of multiplicity of suits: 2. That as the tax was excessive, and not void *in toto,* it cast a cloud on title: 3. That the assessment as made was fraudulent: 4. That the persons enjoined were acting not as State officers, but as individuals, in doing a ministerial act, certifying the assessment, whereby a legal tax law was being executed in an illegal manner.

These were all questions of which the Circuit Court of Appeals had jurisdiction and the questions here involved as far

as they are of the same nature as in that case are conclusively settled by the decree of the Circuit Court of Appeals; and, if not, they could not be reviewed here on certificate of jurisdiction.

8. The bill avers, par. XVI. V, that it was the duty of the State Railroad Assessors, under the Code of 1880, to have assessed railroads for taxation for the years 1886 to 1891 inclusive, and that the reason said assessment was not made was that said assessors regarded the property of Natchez, Jackson & Columbus R. R. Co., as exempt from taxation and not required to be assessed; and by paragraphs IV,, p. 6, and X that said 21st Section provided a special and peculiar method of granting a special and peculiar privilege "in respect to the payment of all taxes." "put in the form of an appropriation made by the legislature out of its public treasury, equal in amount to what would be the taxes assessed against each respective company, and authorizing the same to be paid by said railroad companies, as paymaster of the State, to the creditors of said railroad companies respectively holding construction debts, the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities."

The bill, par XVII, does not deny, but practically admits,

that no assessment of these taxes has ever been made. It avers that the decisions of the State court relied on have defined said 21st Section as an exemption, but that heretofore the necessity for properly construing it as a contract of appropriation had not arisen, and appellant now insists that it is a contract of appropriation.

As such contract of appropriation, and under this alleged construction of said 21st Section, it was a necessary condition precedent that the amount of the taxes should be ascertained by assessment in order that the State might know what amount of money was to be appropriated; and whether the amount paid on construction debts was equal to the amount of taxes assessed. This was, as alleged, a peculiar and special mode of payment of the taxes, and to execute this peculiar mode of payment, the amount of indebtedness to be paid must first be ascertained, and this could only be done by assessment. But the gravamen and prayer of the bill is to enjoin the State Railroad Commission as Railroad Assessors, from making this assessment; in that, after the Commission had found that the property was liable to taxation, and had escaped taxation by reason of not being assessed, and had found the value thereof for the purposes of assessment, and while the assessment rolls were at the instance of Yazoo & Mississippi Valley R. R. Co., lying open for objections to be filed, this bill was filed to enjoin, the Commission from approving

these assessment rolls or certifying them to the clerks as such assessment; R. 33; and the restraining order enjoins *approving* the assessment rolls or certifying the same. R. 88. The bill further prays that the property be "decreed to be exempt from all State and county taxation" for said years.

These averments of the bill affirmatively show that the assessment was an essential perequisite and that this proceeding to restrain the Commission from making it could not be maintained.

The circuit court could well find that the complainant did not show any right to invoke the jurisdiction of that court. Such finding upon this question would pertain for review to the appellate jurisdiction of the Circuit Court of Appeals, as it lies at the threshold, and controls the "whole case."

Maynard vs. Hecht, 151 U. S. 324, supra.

Green vs. Mills, 69 Fed. 852, supra.

Smith vs. *Vulcan Iron Works*, 165 U. S. 518.

Kirwan vs. *Murphy*, 170 U. S. 209.

Lake Nat. Bk. vs. Wolfeborough, 78 Fed. 517.

Appellant could not give rise to a Federal question growing out of the refusal to recognize its rights in regard to the means of payment of said taxes until the taxes had been assessed.

9. The record shows that the Yazoo & Mississippi Valley R. R. Co. and the Natchez, Jackson & Columbus R. R. Co.,

were parties to the proceedings before the Railroad Commission and that Yazoo & Mississippi Valley R. R. Co., appeared before that tribunal and objected to the assessment, because: 1. Said 21st Section was extended by the Act of 1870, p. 675, to Natchez, Jackson & Columbus R. R. Co. by an amendment to its charter; and that it was re-enacted by the Act of 1884, p. 29, and by the Act of 1890, p. 675: 2. Under the Act of 1890, p. 675, the property, franchises and immunities of Natchez, Jackson and Columbus R. R. Co., were conveyed by it by deed to Louisville, New Orleans & Texas Ry. Co., in 1890; and that under their rescpective charters of Louisville, New Orleans & Texas Ry. Co., and Yazoo & Mississippi Valley R. R Co. in 1892 said corporations were consolidated into Yazoo & Mississipppi Valley R. R. Co.; that the payment of the taxes had been made by the required affidavit; that the profits of said railroad company had never enabled it to declare 8 per cent. dividend; and that by the decision in the Lambert case, 70 Miss., 779, the entire question had become *res adjudicata*. R. 94. The Commission overruled these objections, after hearing the evidence, and, then this bill was filed by appellant averring a diversity of citizenship—making Yazoo & Mississippi Valley R. R. Co a party defendant—to prevent the rendition of judgment by the Commission upon the law and facts then fully determined and upon which judgment was *in fieri*. Thus, after full defense by the principal before the Commission, and

after adverse decision, a new trial is sought by injunction in the Federal court of these judicial proceedings in the State court, by an alleged stockholder and mortgagee. Such a proceeeding cannot be maintained in any court of equity regardless of its Federal functions.

Yazoo & Mississsippi Valley R. R. Co., vs. *Adams*, 73 Miss, 648.

Same case, second appeal, Miss. *Decisions, March* 1899.

Youngston vs. *Kentucky*, 64 Fed. Rep., 441.

The Rairoad Commission in making the assessment, had jurisdiction of the subject matter and of Yazoo & Mississsippi Valley R. R. Co., and was acting judicially.

Yazoo & Mississippi Valley R. R. Co. vs. Adams, 73 Miss. 648.

Same case supra.

Wherein it was held that the Code of 1892 and the Act of 1894, chap. 34, entitled "An Act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal Sections 4187, 4190, 4192, 4193 and 4195, in chapter 126 of the Annotated Code of Mississippi," Acts 1894, p. 29, in regard to the assessment of railroads for taxation were constitutional, and that the proceedings of the Railroad Commission thereunder were judicial; and that the finding of the Commission that the property was "liable to taxation"

was conclusive upon the question of immunity from taxation; and that the judgment of the Commission could not be enjoined except for fraud. Citing,

Adams Express Co., vs. *Ohio*, 165 U. S. 229.

Railway vs. *Backus*, 133 Ind., 541.

Louisville Water Co., vs. *Clark*, 94 Ky., 47.

Stanley vs. Supervisors, 122 U. S. 154.

Winona vs. *Minn.*, 159 U. S., 534.

Fallbrook vs. *Bradley*, 164 U. S. 167.

Throop Pub. Officers, Section 541.

2 Desety Tax, 625 and note 2.

Burroughs Tax, Sec. 102.

Palmer vs. *Mahon*, 135 U. S., 665.

Railway vs. *Backus*, 154 U. S., 427.

This construction of the scope of these judicial proceedings, under these statutes by the State Supreme Court, will be followed by this court.

Forsyth vs. *Hammond*, 166 U. S. 516-18-9-20.

Backus vs. *Fort Street Depot Co.*, 169, U. S., 559.

Covington vs. Kentucky, 173 U. S., 231.

Henderson Bridge Co., vs. *Henderson*, 173 U. S. 602.

With full opportunity for defense before the Commission, one month being allowed for filing objections, the appellant, claiming to be in privity with Yazoo & Mississsippi Val-

ley R. R. Co., abandoned the forum organized expressly to decide what property was "liabe to taxation," and by injunction seeks to make in the Federal court, the defenses which should have been made before the Commission. This cannot be done.

Albuquerque vs. *Perea,* 147 U. S. 582.

Walston vs. *Nevin,* 128 U. S., 582.

Forsyth vs. *Hammond,* 166 U. S., 519-20.

Blythe vs. Hinckley 173 U. S., 508.

Says this court in the last case, p. 508: "It is enough for the present purpose that the State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on Federal questions thus intimated; for the Constitution, laws and treaties of the United States are as much a part of the laws of every other State as its own local laws and constitution, and if the State courts erred in judgment, it was mere error and not to be corrected through the medium of bills such as those under consideration."

10. If jurisdiction is conferred by Sec. 483, Code, 1892, to enjoin the collection of taxes not authorized by law upon the Federal court under Cummings vs. Bank, 101 U. S. 157, the circuit court of appeals upon appeal had jurisdiction of that question .

11. Where by a single suit to recover back the entire claim can be determined equity has no jurisdiction. Shelton vs

Platt, 139 U. S. 595, and whether such was the case pertained to general equity jurisprudence.

12. Whether Lambert's case was *res adjudicata* as averred was a question of general equity jurisprudence and involved no Federal question.

San Francisco vs. *Itsell* 133 U. S., 65.

13. It affirmatively appears that the 21st Section as an exemption, was plead before the Railroad Commission and that the Lambert case was there plead as *res adjudicata* of this assessment, and the Commission decided both questions adversely to Yazoo & Mississippi Valley R. R. Co., and this decision was *res adjudicata* of these questions.

Yazoo & Miss. Valley R. R. Co., vs. *Adams*, 73 Miss. 648.

Same case on second appeal; Miss., Dec., March 27, 1899, p. 155.

Pittsburg vs. *Backus*, 154 U. S. 421.

Palmer vs. *McMahon*, 133 U. S. 665.

Forsyth vs. *Hammond*, 166 U. S. 517.

Decree of said chancery court set up in affidavit.

EXEMPTION—REPEAL.

To give rise to a Federal question and to create jurisdiction under the Constitution of the United States a contract of immunity from taxation must exist. Was it in existence from

1886 to 1891, the period covered by this assessment?

The bill is predicated upon the existence from 1886 to 1891 of an immunity from taxation, as to the property formerly belonging to Natchez, Jackson & Columbus R. R. Co., under said 21st Section as a part of the charter of Natchez, Jackson & Columbus R. R. Co., and upon the hypothesis that the benefits of this section passed to Louisville, New Orleans & Texas Ry. Co., by the deed from Natchez, Jackson & Columbus R. R. Co. in 1890, under the Acts of 1890, p. 675, and that the immunity followed this property into the hands of Yazoo & Mississippi Valley R. R. Co., under the consolidation of Oct. 2, 1892. The basis of the claim, therefore, is through the charter of the Natchez, Jackson & Columbus R. R. Co.

What is the true meaning of said 21st Section?

It is admitted in the bill that the courts of Mississippi have uniformly characterized this 21st Section as an *exemption* from taxation.

Mills vs. *Cook*, 56 Miss., 40.

Railway vs. *Taylor*, 68 Miss., 361.

McCulloch vs. *Stone*, 64 Miss., 378.

N. J. & C. R. R. Co., vs. *Lambert*, 70 Miss., 779.

The bills in Miss. Mills vs. Cook, 56 Miss., 40, R. 102, and in Lamberts case, supra R. 779, R. 113 averred this 21st Section to be a contract of appropriation; and the Miss. Mills case claimed protection of the Federal Constitu-

tion against repeal. Demurrers were filed in each of those cases, and the court held in both the cases that it was an *exemption,* and *repealable.* The pretense of this bill that this contract of appropriation theory is *res nova* is silenced by these decisions. The court in Lambert's case held that it is an exemption, "a mere grace," because *"paying is the burden."*

This 21st Section is a *conditional exemption* from taxation: that is, the taxes are agreed not to be exacted if the Railway Company will pay the amount thereof on its own debts of construction, for money borrowed, etc., and this is to continue until the company is enabled to declare an 8 per cent, dividend. The payment of its own debts is manifestly no benefit to the state. A promise to pay one's own debts is *nudum pactum* So, the State receives no benefit or advantage from the payment of the company's construction debts, and yet, for doing that which the company was otherwise legally bound to do—pay its debts—the company is released from the payment of the taxes assessed against it, and a receipt in full is to be given therefor.

This is, manifestly, a release from the burden of taxation. The mandate of the Constitution is that the property of corporations shall be subject to taxation *the same* as that of individuals; and that taxation shall be equal and uniform throughout the State, and yet, individuals and other corporations not favored with 21st Sections must pay the taxes assessed against

them in money—this company, by an affidavit that it had paid its debts. Terminology cannot change the essential thing. By the "contract of appropriation" this company is not to pay to the State, county or municipality any money as taxes—the same effect is produced by calling it an exemption. In fact, the Act of 1884, p. 29, which the Lambert case holds is the source of title to this immunity, enacts it as an *exemption*, and the Act of 1890, p. 12, treats it as an exemption.

There was no settled policy of exemption as averred in the bill.

The Constitution of 1832 left the matter of exemption from taxation to legislative discretion; it did not even contain the equality and uniformity clause. In 1857, by the Code of 1857, Art. 5 p. 292, all charters were declared to be repealable unless expressly made irrepealable.

Shotwell vs. *Ry. Co.*, 69 Miss. 556.

Columbus vs. *Bank*, 73 Miss., 96.

Y. & M. V. R. R. Co., vs. *Adams*, 77 Miss.

S. C. Said No. 244.

In 1869 a new Constitution was ordained and this policy of leaving these matters to legislative discretion was revoked, and the prohibitions and restrictions upon legislative power contained in said Sections 5, 14, 13 and 20 were ordained.

Such was the status of general statuatory and constitutional law on this subject when the charter of Natchez, Jack-

son & Columbus R R. Co., was granted in 1870. Acts 1870, p. 221.

The original charter of Natchez, Jackson & Columbus R. R. Co., contained no exemption or immunity whatever from taxation. But Section 26 provided: "And the rights, power and authority granted in and by this Act of Incorporation shall be perpetual, except that the same may be altered or amended as necessity may require."

Thus by the *general law* then in force, as well as by the prohibitions of the Constitution of 1869, and by its own terms, this original charter was repealable.

Said 21st Section was first enacted in 1870, as an attempt to evade the Constitution of 1869. *Lamberts case*, p. 786. By a *special* Act of August 8, 1870, the charter of the Natchez, Jackson & Columbus R. R. was amended, and the benefits of said 21st Section were extended to that company.

By the Code of 1871, superseding the Code of 1857, it was declared: "The following property and no other, shall be exempt from taxation, to-wit:" specifying, but not including railroads. Section 1662.

There is no special mention made of railroads as subject or not to taxation the Revenue chapter 22, Code 1871; Sec. 1668 provides: "All incorporated banks or other companies liable to taxation on their capital stock shall be assessed," etc. While Sec. 1747 imposed a privilege tax upon express,

telegraph and insurance companies, railroads were not subjected to any privilege tax.

The necessary result of the provisions of the Code of 1871 in view of Art. XII, Sec's. 13 and 20 of the Constitution of 1869, would be a repeal of the said 21st Section, and the imposition of *ad valorem* taxes upon Natchez, Jackson & Columbus R. R. Co.

The bill avers that its construction was not commenced until several years after the grant of the charter, and that it is uncertain whether any work had been done before 1878—the time of the decision of Miss. Mills case. R. 10.

So, before any expenditure had been made in construction, the said 21st Section, if repealable, was repealed by the Code of 1871. The effect of the Code of 1871 upon the said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co., has never been considered or decided in any case.

In 1875 chap. 42, Acts 1875, p. 66., an Act entitled "An Act to Regulate Railroad Taxation" was passed, whereby it was provided: "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax, as follows: * * * and the said privilege tax shall be in full of all other taxes, State, county and municipal, due from such company, or for which said company or its property could, but for the passage of this Act, be made in any manner liable; * * *.

Provided, that lands owned by railroad companies, and not acquired and used in operating ralroads, shall be taxable as other property."

By this Act the *ad valorem* taxation of railroads under the Code of 1871, was changed to a commutation privilege tax, and this tax was required to be paid by every railroad company in the State. This was a *general statute* specifically taxing railroad companies.

Such system of commutation privilege taxation was declared to be constitutional as to banks in *Bank* vs. *Worrell*, 67 Miss., 47.

Thus, before construction was commenced the immunity from taxation of Natchez, Jackson & Columbus R. R. Co., had been repealed by this act of 1875; and it was expressly so decided by Lambert's case, so much relied on by the bill.

In 1878, Chapter 116, Acts 1878, p. 233, a *special act* was passed in regard to the exemption of Natchez, Jackson & Columbus R. R. Co., reciting among other things, that 30 miles of the railroad had then been built; and that said act of 1870 extending said 21st section to Natchez, Jackson & Columbus R. R. Co. was not approved until after the adjournment of the legislature, and that the act was not passed by an aye and nay vote, and that doubt as to its constitutional enactment existed, and thus reciting, it, again, extends said 21st section to said company as to past and future taxes. This *special* act was ap-

proved March 5, 1878.

By a *general* act, approved the *same day* as the last named special act, March 5, 1878, Chapter 11, Acts 1878, p. 87, said act of 1875, p. 66, was amended so as to provide; "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax of $80 per mile, upon each of said roads and branches thereof, in this State, except that upon narrow guage roads the privilege tax shall be but $40 per mile, and the said privilege tax shall be in full of all State, municipal and county taxes; fifty *per cent.* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties; *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad."

By this general taxing act it is clear that all the railroad property in the State was selected for and subjected to taxation. The language is mandatory.

The bill in Miss. Mills vs. Cook, 56 Miss. 45, was filed January 4, 1878. On March 12, 1878, the Chancery Court sustained the demurrer and dismissed the bill, and thereby adjudged that the legislature had power to repeal an exemption,

even though in the form of a contract of appropriation. In April, 1878, the State Supreme Court affirmed this decree, and, interpreting Section 13, Constitution 1869, R. 8, (*Yazoo & Miss. Valley R. R. Co.* vs. *Adams,* said No. 244.) held that the legislature had the power to select the classes of property to subject to taxation, and that the Acts of 1872 and 1873, exempting factories—individual and corporate — as a *general* class, were not violative of said Section 13; but that all classes of property selected for taxation must be equally subjected to taxation and that the legislature had the power to repeal the said exemption claimed, and that the act of 1877 repealing it in part was constitutional.

So, concurrently with the re-enactment of said 21st section by *special* act in 1878, there was a tax imposed by *general* act on all railroad property, and a judicial interpretation of Section 13 made that all property, individual or corporate, selected for taxation must be taxed alike. Hence, under the rule of Mills vs. Cook this special act of 1878, re-enacting said 21st section was unconstiutional.

No claim is made in the bill to any source of title to the immunity except the said act of 1870.

In Lambert's case the court held that the exemption repealed by the said act of 1875, was re-enacted by this *special* act of 1878. The attention of the court in that case was not drawn to the said general act of 1878 amending said act of 1875,

and approved on the same day as the said special act, nor was the effect of this general act of 1878 drawn in question or decided in Lambert's case. If it had been, under the principles of that case and of Mills vs. Cook, and *Worrell* vs. *Bank*, 67 Miss, supra, it would have been declared unconstitutional. It was so held by the Chancery Court in the decree set up in the affidavit filed in this court. There was, therefore, no exemption from taxation under the act of 1878.

Code 1880, Chapter 10, Section 597, provided that "each railroad company owning and operating a railroad in this State shall * * in each year, file with the auditor * a complete schedule of all its property, real or personal," specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Section 599 provides that the governor, auditor and secretary of state "shall * * assess the value of each railroad for the purposes of taxation," etc. "Section 604. The taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Section 605. The collector of taxes for any county shall collect the amount due the county, as is now provided by law in the case of delinquents." "Section 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property belonging

to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

"Section 607. Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; * * *provided* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY."

"Section 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State Treasurer * * in each and every year a privilege tax as follows, to-wit:" Specifying the several roads, and the amount of privilege tax, and among those specified is "Natchez, Jackson & Columbus R. R. Company, thirty dollars per mile;" * * "Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although

the whole road may not be finished."

Section 468, Code 1880, of Chapter 10, on public revenue, of which Sections 597-608 are a part, provides: "The following property, and no other shall be exempt from taxation, to-wit," specifying—but these do not include railroads; and the only exemption granted railroads is to those under process of construction under Section 608, Code 1880.

The Code 1880 changes the act of 1878 supra, in that there the privilege tax was imposed primarily as a commutation tax; by the Code *ad valorem* taxes were primarily imposed; and to those companies that would accept, *in writing*, the provisions of Chapter 10, the right was given of paying a privilege tax in lieu of State and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*

Code 1880, Section 3, provides: * * "All acts and parts of acts, the subject of which are revised, consolidated and re-enacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating thereto, which may be contained in this Code," And Section 8: "No private act, or act of local application, not revised or brought into this Code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re-enacted" by the Code, and "each railroad" is required

to pay *ad valorem* taxes, except that if it will accept the provisions of the act, in writing—that is, thereby indicating their election to pay privilege instead of *ad valorem* taxes they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case (the author of the Code of 1880 delivering the opinion) and in Y. & M. V. R. R. Co., v. Adams No. 244, the Code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The *general* act of 1884, Chapter 22, (p. 29) entitled, "an act to amend Sections 607 and 608 of Code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that Section 607 of the Code of 1880 be so amended as to read as follows," copying the exact language of Section 607, and then adding these words: "Any exemption in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries; *provided, further,* that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886."

Section 2 reads exactly as Section 608 of Code of 1880, except that the privilege tax is increased in amount and the speci-

fication as to the N., J. & C. R. R. Co. is as follows: "The Natchez, Jackson & Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to Section 608 these words: "All the railroads not named herein and not exempt from taxation by their charter, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the Code of 1880. In said No. 244, it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted, and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant (*Y. & M. V. R. R. Co.* v. *Thomas*, 65 Miss. 553, S. C., 132, U. S. 174; *State* v. *Simmons*, 70 Miss. 485), this statute cannot be said to create an exemption.

Applying this amendment to the Code sections it amends, we find that it does not purport to amend Sections 597-606 of Code imposing *ad valorem* taxes, but is confined to the amount

of privilege tax the several roads are to pay. In that light the statute would read that Natchez, Jackson & Columbus R. R. Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the State Treasurer, * * * in each and every year, a privilege tax, as follows: * * * The Natchez, Jackson & Columbus R. R Co., "forty dollars per mile after expiration of exemption as provided for in its charter and acts amendatory thereof."

This would mean, strictly constructed, that after the time —namely, thirty years from 1870—named in its amended charter, the N., J. & C. R. R. Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of Sections 597-606 are for every year *in presenti*, and not thirty years *in futuro*.

As there is no provision in the act of 1884 for a privilege tax on N., J. & C. R. R. Co. in lieu of *ad valorem* taxes of current years, but only for such privilege tax after thirty years from 1870, and as the act of 1884 only amends Sections 607 and 608 of Code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N., J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words "after expiration of exemption as provided in its charter and acts amendatory thereof" should be con-

strued as meaning that the legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when in fact no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicted the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, Sections 372-3-4.

There is no repealing clause to this act. It provides for amending Sections 607 and 608 of the Code so as to read as there provided. The necessary result of not providing, by the act of 1884, for a present privilege tax as commutation for present *ad valorem* taxes imposed by Secs. 597-606 would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem* taxes imposed by Sections 597-606 *in futuro,* would be no modification of the statute imposing taxes *in presenti.*

When the Code of 1880 and the act of 1884 provided for *general* taxation of railroads under Constitution 1869, Art. xii, Section 13 (as interpreted in Mills v. Cook), all railroad property must be taxed, and the attempted restoration of *special exemption* to N., J. & C. R. R. Co. by the act of 1884 would have been unconstitutional.

But if the act of 1884, re-enacted the exemption by pro-

viding that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Section 3 provides: * * * "and hereafter all the railroads in this State shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in Section 589 of the Code of 1880;" and by Section 6 it is provided: "The the act entitled 'An Act to Amend Sections 607 and 608 of the Code of 1880, in Relation to Privilege Taxes on Railroads, Approved March 3, 1884,' be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums 25 per centum greater respectively than the sums mentioned in said act; and hereafter said railriod companies shall pay privilege taxes respectively 25 per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co was mentioned in said act; a privilege tax is imposed *in presenti* of 25 per cent.more than the sums mentioned in said act; "and *hereafter said* railroad companies," i. e., those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes," etc. Not thirty years hence, but "hereafter," i. e., after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the Supreme Court of Mississippi cor-

rectly held in said No. 244 that this act of 1886 repealed any exemption created before that time.

In 1890 a general taxing act was passed, entitled, "An Act to Amend the Revenue Laws," Acts 1890, p. 6, which, after prescribing general privilege taxes, by Section 5, provides: "That Section 1, of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last provision thereof, and that the same be re-enacted as amended. That Section 2 of said act of March 12, 1884, be amended by striking out all after the word "towit," in line 9, and inserting the following:

The Alabama Great Southern, per mile.....$150 00

* * * * * * *

The Natchez, Jackson & Columbus, per mile..... 50 00

* * * * * * *

The Yazoo & Mississippi Valley, per mile..... 100 00

* * * * * * *

The Mobile & Northwestern, per mile..... 150 00

And all other roads constructed and to be constructed,

per mile,..... .... 100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished

and used for profit after such time, the same so used shall be taxed," etc.

In Lambert's case it was held that this act recognized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under Sections 13 and 20, Article 12, Constitution 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of Section 13, Article 12, declaring that all property shall be subject to taxation, and of Section 20, that taxation shall be equal and uniform. Under the rule of *Mills* v. *Cook*, 56 Miss. 46; *Lambert's Case*, 70 Miss. 779; *Worrell* v. *Vicksburg Bank*, 67 Miss. 47, and of *Adams* v. *Miss. Bank*, 75 Miss 701, this proviso would be unconstitutional if it created anew an exemption.

The true construction of said Sections 13 and 20, Article 12, Constitution 1869, is that adopted by the court in said No. 244, following the decisions of this court in *Louisville* vs. *Palmes*, 109 U. S., 248; *St. Louis* vs. *Berry*, 113 U. S., 475; *Schurz* vs. *Cook*, 148 U .S., 408; *Keokuk* vs. *Missouri*, 152 U.S., 310-12, whereby it is declared that these provisions are

mandatory upon the legislature and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* vs. *V., S. & P. R. R. Co.,* 116 U. S, 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. It follows, therefore, that when the Constitution of 1890, was framed there was no existent exemption from taxation in Natchez, Jackson & Columbus R. R. Co., or in Louisville, New Orleans & Texas Ry. Co. as the grantee of its property, franchises and immunities.

If there was any doubt under the Constitution of 1869, the Constitution of 1890 made it certain that all railroads should be taxed and that, then, legally existing exemptions were repealable by the legislature. Sections 112, 181, 182, Constitution 1890. In *Adams* vs. *Miss. State Bank,* 75 Miss., 701, this Constitution was construed, and it was held that whenever a class of property was selected, all of that class must be taxed alike. The decisions of this court, followed by the State Supreme Court, in *Yazoo & Miss. Valley R. R. Co.* vs. *Adams, State Revenue Agent,* No. 244, held that taxation of all corporate property was mandatory.

In Lambert's case this clause of Section 181, "Exemptions from taxation to which corporations are legally entitled at the

adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," was disposed of by this language: "Section 181, of the Constitution, has no effect as to the exemption claimed. It left the matter as if the Constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law." P. 790.

Therefore, there was no exemption from taxation from 1886 to 1891 of Natchez, Jackson & Columbus Railroad, and it was so held by said Chancery Court.

But if said exemption should be declared to then exist said 21st section declares that it shall be *irrepealable*, and this is in clear violation of said Article xii, Sections 13 and 20 of the Constitution of 1869, and is so held by every decision, State and Federal, on the subject. *Mills* vs. *Cook, supra; Bank* vs. *Worrell, supra; Attalla* vs. *Kelly, supra; Adams* vs. *Miss. State Bank, supra; Adams* vs. *Yazoo & Miss. Valley R. R. Co.*, said No. 244; *Louisville* vs. *Palmes*, 109, U. S., *supra; St. Louis* vs. *Berry*, 113, U. S., *supra; Schurz* vs. *Cook*, 148, U. S., *supra; Keokuk* vs. *Mo.*, 152, U. S., supra; 38 *Iowa*, 635; 34 *Cal.* 432; 25 *Ark.*, 289; 19 *Fla.*, 231.

Therefore, there could arise no question under the Constitution of the United States, because the alleged contract of exemption was void *ab initio* under the State Constitution.

There must be a *consideration* to the State to constitute a contract within the meaning of the Federal Constitution. *Tucker* vs. *Ferguson*, 22 Wal. 527; *Grand Lodge* vs. *New Orleans*, 166 U. S., 143.

The consideration recited in said 21st section was benefits to be received through a railroad *to be constructed*, not the grant of a *bonus* to a *constructed* road. The bill avers that the railroad "was not begun until several years after its charter" was granted; and that complainant is not informed whether any work had been done prior to the decisionof Miss. Mills vs. Cook by the Supreme Court; but that it was January, 1879, a full year after this decision before the road was finished from Natchez to Martin, 43 miles; and not until 1881, that it was extended from Martin to Miles, 15 miles, and not until 1882, that it was extended to Jackson. R. 10. The Supreme Court held expressly in the Lambert case that the said act of 1875 repealed said 21st section, and that it was re-enacted by the said act of 1878, p. 233, and that it was repealed by the Code of 1880, but that the exemption from taxation as an exemption was re-enacted by the act of 1884, the Lambert case declaring that this exemption was a "mere grace."

It is, therefore, clear that the railroad was not constructed on the faith of the exemption, and that the grant now claimed to exist was made in 1884, *after* the road was finished, and,

hence, not a contract within the Federal Constitution and it cannot give rise to a Federal question.

NO RIGHT AS STOCKHOLDER.

The bill predicates its right to relief in one aspect upon the relation of appellant, Illinois Central Railroad Company, to Yazoo & Mississippi Valley Railroad Company in this, that Mississippi Valley Company is a stockholder in Yazoo & Mississippi Valley Railroad Company and Illinois Central Railroad Company is the holder of the majority of the stock of the Mississippi Valley Company, and, therefore, appellant seeks to assert the right of Mississippi Valley Company against Yazoo & Mississippi Valley Railroad Company. This could not give rise to a Federal question. Stockholders cannot sue on behalf of the corperation unless *special* and sufficient reasons are shown. *Dodge* vs. *Watsey*, 18 How. 331; *Taylor* vs. *Holmes*, 127, U. S., 489; *Porter* vs. *Sabin*, 149, U. S. 473; *Foster's Fed. Prac.* Section 12, and even then, the Mississippi Valley Company would be an indispensable party to the suit. *Swan Land Co.* vs. *Frank*, 148 U. S., 603

No compliance with the 94th Equity Rule is shown.

NO RIGHT AS MORTGAGEE—JUDGMENT OF COMMISSION—JURISDICTION TO RESTRAIN.

A court of equity, State or Federal, has no jurisdiction to restrain the State Railroad Commission from hearing any ob-

jections that might be filed to the said assessment; nor from approving the assessment in process of adjudication, at the in stance of the owner or mortgagee.

1. The State Railroad Commission is a Constitutional Board of Assessors.

Const, 1890. Section112; *Y. & M. V. R. R. Co.* vs.*Adams,* 73 Miss., 648; *S. C., second appeal, Miss. Decis.* March, 1899, p. 155; *State Railroad Cases,* 92, U. S., 801; *Huntington* vs. *Wootten,* 120, U. S., 97; *Q. O. & C. Ry. Co.,* vs. *People,* 156. Ill., 441.

2. It, as a State Board of Assessors, is a court of special, limited and *exclusive* jurisdiction. *Y. & M. V. R. R. Co.* vs. *Adams,* 73 Miss., *supra; S. C., March,* 1899, *supra.* Code 1892, Section 3875 *et seq.* Acts Miss., 1894, Chapter 34;*Ratenberry* vs. *Yallabusha* 68 Miss., 470.

3. Its judgment is conclusive upon the value and what property is properly assessable, and whether exempt. *Y. & M. V. R. R. Co.* vs. *Adams, Miss., Dec.* March, 1899, *supra; Youngston* vs. *Kentucky,* 64 Fed. 441; *Throop Pub. Officers,* Section 541; *Stanley* vs. *Sup,* 122, U. S., 550; *Palmer* vs. *McMahon,* 135, U. S., 665; *Walston* vs. *Nevin,* 128 U. S., 582; *Ry. Co.* vs. *Backus,* 154, U. S., 427. Jurisdiction to determine the existence or not of an exemption of railroad property is expressly conferred by Code 1892, Sections 3875-3877, *Y. & M. V. R. R. Co.* vs. *Adams,* Miss. Dec., March, 1899, *supra;* and

in this respect the Commission differs from Boards of Supervisors.

4. The Commission's judgment was *in fieri* at the time of filing this bill awaiting objections to be filed, and therefore, injunction would not lie. *Y. & M. V. R. R. Co.* vs. *Adams,* 73 Miss., 648. The mortgagor Yazoo & Miss. Valley R. R. Co., had appeared before the Commission and pleaded the exemption and that Lambert's case was *res adjudicata,* and these defenses had been decided adversely to it; and when the period for filing objections had *not* expired, the mortgagee seeks to attack the judgment in this collateral way. *Albuquerque* vs. *Perea,* 147 U. S., 90; *I. C. R. R. Co.,* vs. *Hodges,* 113, Ill., 323; *2Beach Inj.,* Sec. 1203, *Ry. Co.,* vs. *Backus,* 133 Ind., 513, S. C., 154, U. S., 427. The remedy at law was then clear and adequate;and in case of adverse decision at law *certiorari* to review the decision was the proper remedy. *Y. & M. V. R. R. Co.* vs. *Adams,* Miss. Dec., March, 1899, *supra;* Code 1892, Sections 89-90.

A Federal Court has no jurisdiction to enjoin proceedings in aState Court. *U. S. Revised Stat.* Section 720; *2 Desty Fed. Proc.* p. 1170.

The owner of the property assessed, Yazoo & Miss. Valley Railroad Company makes no complaint of the assessment so made, and without any averment of insolvency, the mortgagee seeks to make the complainant as its privy in estate.

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5. Under the statutes of Mississippi in force from 1886 to 1891, inclusive, taxes assessed were superior liens to a mortgage "whensoever created."

"Taxes assessed upon lands or personal property shall bind the same and be entitled to preference over all judgments, executions, encumbrances or liens whensoever created; and all taxes shall be a lien upon and bind the property assessed," * * * "and it shall not be necessary to the validiay of an assessment that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest the title in the purchaser, without regard to who may own the land or other property when assessed or sold." Code 1880, Section 470. Code 1892, Section 3746.

There was during the period, 1886-1891, provision for assessing property that had escaped taxation as follows: "The collector shall assess and collect taxes on all land liable to taxation left unassessed by the assessor * * * and he shall also assess such other persons and property as he may find unassessed by the assessor." Code 1880, Section 509, Code 1892, Section 3800.

By Chapter 34, acts of 1894, it is provided that if the State Revenue Agent shall discover property or persons that have "escaped taxation by reason of not being assessed" he shall give notice to the assessor or collector to assess the same and

by Section 4, "If the property which the Revenue Agent discovers to have escaped taxation shall belong to any railroad or other corporation, which, under the law, is required to be assessed by the State Railroad Assessors, the Revenue Agent shall give the notice required herein to said State Railroad Assessors, and they shall give the required notice to the company or corporation. At their next meeting, after giving the proper notice, said property shall be assessed in the same manner required by law," &c.; and by Section 1, said State Revenue Agent is created a State officer; and by Section 2: "He shall have power and it shall be his duty to proceed by suit in the proper court against all * * persons, corporations, * * * for all past due and unpaid taxes of any kind whatever. * * * He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue."

Under these statutes this results:

1. That the assessment is against the property, "without "regard to whom the land may be set down as reputed owner, "or who may own the land when assessed or sold."

Virden vs. *Bowers,* 55 Miss. 24.

2. The tax is a lien superior to any encumbrance or lien "whensoever created." Desty Tax. 739 et seq. Code 1880, Section 470. Code 1892, Section 3746.

3. When appellant became mortgagee the statutes for as-

sessing back taxes existed, and, it took *with notice* of the right to assess, and that such assessment would be superior to any mortgage "whensoever created."

"The omission of the tax officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." *Vicksburg* vs. *Dennis,* 116, U. S., 670. In that case the escape from assessment for taxes had been because the exemption had been treated as valid.

4. The mortgagor is owner until after sale, except as against the mortgagee after condition broken. Code 1880, Section 1204, Code 1892, Section 2449. The mortgage is no defense to a suit by mortgagor to recover the property or for damages thereto. *Illinois Central R. R. Co.* vs. *Hawkins,* 65 Miss. 200.

5. Until sale the mortgagor was owner of the equity of redemption, and, hence, the assessment, in any event, would bind it. And this is vendible under execution.

Vicksburg vs. *McCutchen,* 52 Miss. 645.

6. The deposit of the N., J. & C. R. R. Co.'s bonds with a trustee as security for the obligations appellant had assumed by its bonds would constitute only an equitable mortgage, and in order to constitute a *bona fide* purchaser for value, without notice, the purchase must be of the legal and not of the equit-

able title.

Wailes vs. *Cooper,* 24 Miss. 208.

7. As between purchasers under a trust deed, and under a sale for taxes imposed subsequently to the execution of the trust deed, the latter has the better title. "The lien of the State is the superior one, although subsequent in time, a superiority invariably according to it in the absence of some legislative declaration to the contrary."

Stafford vs. *Fizer,* 82 Mo. 396.

This case was approved in Keokuk vs. Scotland, 152 U. S., 327, where it is declared, that if the mortgagee is not made a party to the suit to enforce the lien for taxes that he would be entitled to redeem from the purchaser under the tax lien sale.

8. Retrospective taxes may be assessed under laws subsequently enacted. *Desty Tax,* 646. *Cooley Tax,* p. 291. *Winona* vs. *Minn.,* 159, U. S., 528-9.

A provision for assessing property for four years prior taxes was held valid. *Sturgis* vs. *Carter,* 114 U. S., 511.

Where the escape had been by an alleged exemption the taxes may be retrospectively enforced.

Vicksburg vs. *Dennis,* 116 U. S., *supra.*

It is settled in Mississippi that a corporation may be assessed for taxes for former years by the proper authority.

State vs. *Simmons,* 70 Miss. 485.

Bank vs. *Adams,* 74 Id. 179.

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And under Chapter 34, acts 1894. Y. & M. V. R. R. Co. vs. Adams, 73 Miss. 648; S. C. second appeal Miss. Dec. March 1899,*supra, Bank* vs. *Adams,* 74 Miss, *supra.*

9. Before an injunction could be obtained the complainant would be required to do equity, and that would require a tender of the taxes assessed against the mortgagor by the assessment.

Mortgage Co. vs. *Jefferson,* 69 Miss. 770.

Meridian vs. *Ragsdale,* 67 Id. 86.

10. The State has a lien for taxes assessed and for those that are properly chargeable on the property. Back taxes may be assessed and collected though the land may have passed into the hands of a *bona fide* purchaser.

Blackwell Tax. Tit., 4th Ed. p. 184, 5, 6, and cases.

If as mortgagee appellant had to pay the taxes it would be subrogated to the lien of the State.

Ingersoll vs. *Jeffords,* 55 Miss. 37, 40.

11. The mortgagee is a necessary party to the suit by State Revenue Agent to enforce the assessment when made; and if not made a party, the right to redeem would not be cut off. *Keokuk* vs. *Scotland,* 152 U. S., 327. In such suit to enforce the assessment every defense available can be made.

A mortgagee is privy in estate with the mortgagor as to actions begun before the mortgage was executed and is bound by decrees in such cases; but not by suits begun *after* the exe-

cution of the mortgage to which he is not a party. *Keokuk* vs. *Missouri,* 152, U. S., 314.

The rule that a party is precluded from relitigating questions involved in the former decision does not extend to denying the right of a party in a suit for subsequent years taxes from showing that the act under which he claimed previous year's taxes in the former suit was *unconstitutional. Philadelphia,* vs. *Ridge Av. Ry. Co.,* 142 Pa. St. 484. *Boyd* vs. *Ala.,* 94 U. S., 645, and this as between the original parties.

The case of Vicksburg, Shreveport & Pac. R. R. Co. vs Dennis, 116 U. S., *supra,* forcibly illustrates in one aspect the case at bar. In Morgan vs. La., 93, U. S., 217, the question was litigated whether the exemption from taxation had passed to a purchaser, and the court treated the exemption as existent, and interpreting the terms of the sale, held that the immunity did not pass. There, as in Lambert's case, no question of the constitutionality of the exemption was decided.

Subsequently in the Dennis case, supra, the question of the validity of the exemption was raised, and their court held that the exemption did not exist.

So, with the Supreme Court of Mississippi in said case, No. 244. And both this court and that held that the "omission of the taxing officers to assess certain property cannot control the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construc-

tion of a statute under which its exemption is claimed."

12. The Kentucky tax cases illustrate clearly the soundness of appellee's position here. Where there exists a power of repeal of an exemption from taxation—Constitution. 1869, Art. xii, Sections 13 and 20—the subsequent revocation of the immunity constitutes no breach of the Federal Constitution. *City Sav. Bank* vs. *Owensboro,* 173, U. S., 644; and the decision of the State Court upon the construction of its taxing statutes in their relation to the State Constitution will be followed by this court, even though this court may doubt its soundness. *Id.* No county or city is bound by the judgment of a State court as *res adjudicata,* even though the question may be identical, unless a party to the judgment. *Stone* vs. *Farmers Bank,* 174, U. S., 412. Whether a county or city is bound by a decision of the *identical question,* under the same circumstances and conditions, was left undecided by a divided court. *Id.* In *Stone* vs. *Farmers Bank, supra,* the bill was filed not to restrain the assessors from approving the assessment, as here, but from certifying the assessment, as approved, to the officers for collection; the former being a judicial, the latter a clerical function.

The court, in 88 Fed. 987, was careful not to enjoin any proceedings whatever in the State court. The court below there held that the decision of the State court holding the exemption irrevocable was *res adjudicata* of that *identical* ques-

tion under the same conditions and circumstances, and that the court was bound by the decision of the State court, thereby following *New Orleans* vs. *Citizens Bank*, 167, U. S., 371, and that having been established as an irrevocable contract by this judgment of the State court it was protected by the Federal Constitution. This decision of the court was affirmed by a divided court. Thereby this court overturned New Orleans vs. Citizens Bank as authority. As clearly shown by the opinion in said No. 244, the last decision of the State court, the Lambert case was not *res adjudicata* of the constitutionality of Section 21, nor of its repeal by the act of 1886; and that it might be *res adjudicata* as to Adams County for the taxes of 1891 and 1892 on N., J. & C. R. R., but it did not decide that it was. If the decision of the State court is followed the last decision nullifies any effect of the Lambert case as *res adjudicata*, and, hence, the contract is not established by *res adjudicata*. There is no *identity* of the question involved under the same circumstances and conditions. In Lambert's case the constitutionality of the 21st section was conceded, and the question was as in Morgan vs. La. *supra*, whether conceding its existence it passed to the purchaser. There was no question of the repealing effect of the act of 1886, *supra*, nor of the act of 1878, *supra*, made or decided, Therefore, the rule of *Keckuk* vs. *Mo.* 152, U. S., 301, was applied in said No. 244. In said No. 244, the Lambert case was not pleaded nor intro-

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duced in evidence as *res adjudicata,* and, therefore, if it had been *res adjudicata* of the question of exemption before No. 244 was decided it was not *res adjudicata* after that decision; the last decision is *res adjudicata. Oakes* vs. *Mose,* 165 U. S., 363; *Stout* vs. *Lye,* 103 U. S., 66; *Mills* vs. *Green,* 159 U. S., 654-8; 1 *Van Fleet Res. Adj.* 88

The Railroad Commission in the case at bar decided that the Lambert case was not *res adjudicata* of the assessment, and the Chancery Court in said decree recited in the affidavit herein adjudged that said judgment of said commission in making the assessment, and the decision of the State court in said No. 244 were *res adjudicata* of the liability of the property to taxation and that the taxes had not been paid. A decision that a matter is or is not *res adjudicata* does not give rise to a Federal question. *San Francisco* vs. *Itsell,* 133, U. S., 65. *Henderson Bridge Co.* vs. *Henderson,* 173 U. S., 608.

DECISIONS OF MISSISSIPPI COURT.

The decisions of the Supreme Court of Mississippi averred do not constitute, as to appellant, a rule of property; nor a vested right; nor a contract; nor *res adjudicata,* so as to raise a Federal question, because:

1. The Mississippi Valley Co. purchased the stock in L., N. O. & T. Ry. Co., in *April, 1892,* R. 17, and appellant purchased L., N. O. & T. Ry. bonds, and took the N., J. & C. R. R. Co.'s mortgage bonds as security and on September 1, 1892

executed its mortgage bonds to pay for said stock and bonds. R. 19.

1. The only case involving the exemption of Natchez, Jackson & Columbus R. R. Co.—and it was not presented there for decision—before the decision in Adams vs. R. R. Co., said No. 244, in 1898, was in N., J. & C. R. R. Co. vs. Lambert, 70 Miss. 779.

In Lambert's case the bill was filed January 9th, 1893, R. 107, the chancellor denied the relief, and, on appeal, at March term, 1893, the Supreme Court reversed the decree in May 1893. R. 90.

So, when, in 1890, L., N. O & T Ry. Co. acquired the N., J. & C. R. R. Co property and franchises, and when Mississippi Valley Co. purchased the stock of L., N. O. & T. Ry. Co., and when appellant purchased the bonds of L., N. O. & T. Ry. Co. and received N., J. & C. R. R. Co. bonds as security, and thereby, as averred, became mortgagee, there had been no decision upon the charter exemption of N., J. & C. R. R. Co., hence appellant, or those through whom it claims, could not have acted on such decision.

2. Miss. Mills vs. Cook, 56 Miss. 40, is relied on. The record shows that this was a bill for injunction by Miss. Mills, a manufacturing corporation, against Cook, tax collector, averring establishment of its factory after, and on the faith of general acts of 1872 and of 1873, (Par. 14 of bill) granting

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a general exemption from taxation to *all factories* in the form of a contract of appropriation but not irrepealable. R. 102; that these acts were amended by the act of 1877, repealing, in part, the exemption; that Cook would accept the affidavit in payment of the taxes on the mill proper, but refused to accept it, under the act of 1877, for taxes on the lands claimed by him not to be a part of the mill proper, but outlaying lands; and averring that these lands were essentially a part of the mill proper, for wood, etc. There was a general demurrer sustained, and the Miss. Mills appealed.

Thus the question there involved arose under a *general exemption law, applicable to all of the factories of the class described,* and not, as here, to a *special grant* of a *special exemption* to a *particular corporation,* and in express terms made irrepealable.

The opinion in that case goes beyond the question involved but it is the *record* and not the opinion that determines what is *res adjudicata.* 1. *Her Res. Adj.* p. 470. All factories—whether owned by corporations or individuals were taxed or exempted alike under this *general statute,* repealable at will, and the question of a special exemption to a special corporation, *irrepealable* by the legislature, was not involved in nor *decided* by that case. In fact, the proposition here was *conceded* by the Attorney General, in that case. The brief reported (56 Miss. p. 50.) states; "upon the whole my conclu-

sion is, that there can be no irrevocable exemption of property, whether of individuals or of corporations for pecuniary profits; that the property of both must forever remain subject to taxation whenever the legislature chooses to impose it; that the taxation of both must be by an equal and uniform rate, and that all taxation must be laid according to value."

No rule of property can be established by a decision in which the question upon which the rule is claimed to arise was a *conceded question* on the trial. *Keokuk* vs. *Missouri*, 152 U.S., 316.

The opinion of the majority of the court in the Miss. Mills case held, that the property of corporations must always be subject, i. e., liable to be taxed, and that whenever a class of property is selected for taxation all of that class must be taxed, and yet this Section 21 declares expressly that the exemption shall be *"irrepealable."*

If, as averred, this Section 21 is not an exemption, but a contract of appropriation, now for the first time asserted, then, the question would be *res nova*, and the decisions complained of have never been relied on as the true measure of appellant's rights.

A special exemption to a particular corporation, whereby its taxes duly assessed are to be paid by an affidavit that it had paid its own debts of construction to that amount, while the individual has to pay his taxes on the same class of property in

money, would violate the rule of Mills vs. Cook, *supra.* Essentially, this is not paying any taxes, and the payment is no payment at all; for a promise to pay one's own debts could be but *nudum pactum.*

The construction of Sections 13 and 20, Art. xii, together could not arise there as it does here. There all factories were taxed or exempted alike, and therefore, equal and uniform taxes were imposed by those statutes. But here railroad property as a class is selected for taxation; and the question is can a statute which exempts one railroad corporation property from its share of the taxes be upheld as making corporate property subject to taxation the same as that of individuals, and as equal and uniform taxation? Mills vs. Cook involved the abstract question of the power to exercise or withhold the taxing power on all of the class alike; this case involves the question of the exercise of the power to exempt a favored one from the class by irrepealable contract.

3. Vicksburg Bank vs. Worrell, 69 Miss. 47, (relied on by the bill)decided in 1889, illustrates that Mills vs. Cook, *supra,* was decided upon the general application of the Act of 1872 to all the class taxed; for, while affirming that the legislature may or may not tax under the Constitution of 1869, it declares: "The subjects of taxation may be classified at the discretion of the legislature, and if all of the same class are taxed alike there is no violation of the equality and uniformity re-

quired by the constitution." P. 57. This case involved a general privilege tax applicable to all banks. The real question was whether the act making a privilege or commutation tax stand in lieu of all *ad valorem* taxes was constitutional. No relationship can be traced between the two cases.

4. Attala County vs. Kelley, 68 Miss. 40, decided in 1890, (relied on by the bill) expressly declares that there is no vested right in methods of taxation. There Kelly, a banker, paid the commutation or privilege tax for the fiscal year, as required in advance; after payment, the privilege tax was repealed and *ad valorem* taxes imposed, and it was held to be within legislative power. The act repealed was the same as was involved in *Vicksburg Bank* vs. *Worrell, supra.* Clearly not a cognate decision to the case at bar.

5. McCulloch vs. Stone, 64 Miss. 378, (also relied on) was decided in 1886. The question decided was whether outlying lands, not used in the business of the railroad, were embraced within the meaning of Section 21.

It was purely a question of the meaning of the calls of the grant. No question of the validity or invalidity of Section 21, as an exemption was decided. The decision was that the outlying lands were not within Sec. 21, and therefore, properly taxable, and, hence, no question of their exemption under Section 21 could arise.

6. L., N. O. & T. Ry. Co., vs. Taylor, 68 Miss. 361, re-

lied on, was decided in 1891, and there it was *conceded on both sides* that McCulloch vs. Stone, supra, had decided that Section 21 was an exemption, and that the sole question was whether the gravel pit was outlying land within that decision. Under this concession the court in a short paragraph said: 'We think the appellant entitled to the exemption contained in the 21st Section of the charter M. & N. W. R. R. Co., Acts of 1870, P. 255, which exemption was conferred upon the consolidated railways by Chapter 555. Acts 1882." This case, as appears by the opinion in Adams vs. Y. & M. V. R. R., said No. 244, was decided upon *an agreement* which incorrectly stated the facts as to this Section 21, being embraced in the charters of one of the consolidating companies, and hence it was decided upon an erroneous concession of law and fact. Whether Section 21 was constitutional or not was not raised or decided. It would be intolerable to create rules of property, vested rights and unimpairable contracts by agreements as to facts or concessions at to the law. Says the court in Keokuk vs. Missouri, 152. U. S., 316. "This, if anything, was the rule of property, declared in this case; and as this rule of property is not relied on in this case, and the tax is defended *upon a ground not put in issue there,* but *conceded by counsel in favor of the company,* it is difficult to see how that case can be regarded as establishing any rule of property," etc.

Neither the N., J. & C. R. R. Co., nor the State were

parties to the Taylor case, nor were their rights there involved. The parties here would not have been bound by that decision if it had been the other way. Estoppels must be mutual to constitute *res adjudicata.* L., N. O. & T. R. R. Co., acquired the N., J. & C. Railroad in 1890, the year before this decision was made and, hence, it did not act in the purchase on the faith of it. The bonds of the N., J. & C. R. R. Co., were issued before this decision, and the appellant acquired its interest in these bonds after the decision.

A mortgage is privy in estate with the mortgagor as to actions begun before the mortgage was executed and is bound by decrees in such cases; but not by suits begun after the execution of the mortgage to which he is not a party. *Keokuk* vs. *Missouri,* supra, 314.

7. State vs. Simmons, 70 Miss. 485, decided in 1893, is relied on by the bill. While it is true that the court held that the property of Miss. Mills covered by the Act of 1882, P. 84, would be exempt, it was *conceded* by counsel on both sides that the Acts of 1872, 1873 and 1882 were valid to exempt all property within their scope; hence, this case is also within Keokuk vs. Missouri, 152, U. S. *supra.* The exemption was by general law not by its terms *irrepealable,* and not to a special corporation nor of a special kind.

8. Natchez, Jackson & Columbus Railroad Co., *et al.,* vs. Lambert, 70 Miss. 779, is particularly relied on by the bill. This

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case was decided against the Railroad Co., by the Chancery court on demurrer, and on appeal in May, 1893, it was reversed and remanded, and this decree of *reversal on demurrer* is relied on. The bill was filed by N., J. & C. R. R. Co., and Y. & M. V. R. R. Co. against J. W. Lambert, Tax Collector of Adams county, seeking to enjoin the *ad valorem* taxes of 1891 and 1892, assessed in the county of Adams against the N., J. & C. R. R. Co., division of the L., N. O. & T. Ry. Co., R. 108, upon the averment that N., J. & C. R. R. Co., was chartered in 1870, and afterwards, by Act of 1870, had said 21st section extended to it; that in 1878, by Act of the legislature, the exemption from taxation was re-enacted; that said 21st section was a contract of appropriation and not an exemption. R. 113; that under the Act of 1890 a sale was made of all the "property, rights, franchises and immunities" of N., J. & C. R. R. Co., to L., N. O. & T. Ry. Co., that on October 25, 1892, "the L., N. O. & T. Ry. Co., was merged into, and consolidated with the Y. & M. V. R. R. Co., and that by said merger and consolidation the capital stock, franchises, etc., of L., N. O. & T. Ry. Co., was merged into and became the property of Y. & M. V. R. R. C.; that the franchise to be a corporation did not pass by said sale to L., N. O. & T. Ry. Co.; but that since said sale N., J. & C. R. R. Co., has preserved its organization, had meetings of stockholders and directors, and was a "going" corporation; that the amount of the taxes of 1891 and 1892 had been applied

upon its debts of construction by N., J. & C. Ry. Co.; and that the tax collector refused to accept the affidavit of either N., J. & C. R. R. Co., or L., N. O. & T. Ry. Co., (Y. & M. V. R. R. Co.,) in payment of the taxes; and prays injunction. The bill was demurred to, but not on constitutional grounds, the demurrer was sustained in the Chancery Court, and the complainants appealed. There was also a plea filed setting up that L., N. O. & T. Ry. Co., on February 29, 1892, before consolidation with Y. & M. V. R. R. Co., had exhibited its bill against said Lambert to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained, and that it was then on appeal, and that this pending suit was a bar.

The record in support of said plea shows a bill by L., N. O. & T. Ry. Co. vs. Lambert, substantially like that in N., J. & C. R. R. Co. vs. Lambert, except that L., N. O. & T. Ry. Co., made the affidavit provided for by Section 21, and Lambert refused to execute receipt; (the affidavit showed that L., N. O. & T. Ry. Co., had, "during the year 1891, actually and in good faith, paid and applied to the payment of debts and liabilities which they may have incurred in the construction of said road, for money borrowed by said company upon said lands or otherwise to be used in constructing said road, a sum equal." etc. This bill was demurred to, the demurrer sustained and bill dismissed by chancellor, and this appeal was pending when the bill was filed by N., J. & C. R. R. Co., and Y. & M. V. R. R.

Co. vs. Lambert, *supra;* and both appeals were decided by the case of N., J. & C. R. R. Co. vs. Lambert, 70 Miss. 779. It was held that the plea of former adjudication (pending suit) was bad because the suit was "fatally defective." The complainant (N., J. & C. R. R. Co.,) could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the Natchez, Jackson & Columbus Railroad, but to a different one," (L., N. O. & T. R. Ry. Co.,) and the decree in L., N. O. & T. Ry. Co. vs. Lambert was affirmed. The decree in N., J. & C. R. R. Co. vs. Lambert was reversed, the demurrer overruled, and leave given to answer.

Looking to the *records* in these cases we find it adjudged; 1st. That N., J. & C. R. R. Co., as a *going corporation* had the right to pay the taxes of 1891-2 on the property in Adams county it had conveyed to L., N. O. & T. Ry. Co., by an affidavit that it had applied the amount of the taxes due upon the property to *its* debts of construction. 2nd. That L., N. O. & T. Ry. Co., the purchaser, did not have the right to pay the taxes on the property conveyed to it by N., J. & C. R. R. Co., by an affidavit that it, L., N. O. & T. Ry. Co., had applied the amount of the taxes on said property to its debts of construction, etc. 3d. That N., J. & C. R. R. Co., was a "going" corporation in 1891 and 1892. 4th. That no exemption was claimed under any act except that under the acts 1870 and 1878. Note. There is no

averment of any exemption under the Act of 1884 or 1890, or Const. 1890 and therefore there could be *no adjudication* of any immunity recited in the opinion under these acts.

There is no reference in the opinion to the Act of 1878, approved the same day as the re-enacting Act of 1878, Acts 1878, pp. 87, 233, whereby the Act of 1875 p. 66 is amended and railroads as a class are selected for taxation, nor to the Act of 1886, *supra*, repealing the Act of 1884; nor is there any question of the constitutionality of said 21st Section litigated or decided. The case was decided on demurrer, and, therefore, only questions actually litigated and decided became *res adjudicata*. *Wiggins* vs. *O. & M. Ry. Co.* 142 U. S. 410.

In Adams vs. Y. & M. V. R. R. Co., said No. 244, the opinion of Mr. Justice Whitfield contains a clear and unanswerable exposition of these Mississippi cases, and shows that they are no barrier to the making and enforcement of this assessment.

THIS IS A SUIT AGAINST THE STATE.

Sec. 4194, Code 1892 provides that "all suits by the State Revenue Agent shall be in his own name for the use of the State, county, municipality, or levee board interested, and he shall not be liable for costs and may appeal without bond:" and the Act of 1894, p. 29, Section 2 provides: "He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue." The injunction

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was against the State Railroad Assessors from approving the assessment for taxation upon which State, county and municipal taxes were to be based, and against the State Revenue Agent from bringing any suit to enforce said assessment. Essentially it was a restraint imposed upon the State itself and the suit was one against the State. *In re Ayers*, 123 U. S. 443; *Hans* vs. *La.* 134 U. S. 10; *In re Tyler*, 149 U. S. 165; *Tindall* vs. Wosley, 167 U. S. 219; *Fitts* vs. *McGehee* 172 U. S. 524-8; *Harkrader* vs. *Wadley* 172 U. S. 169. *Rev. Stat. U. S.* Sec. 720.

RES ADJUDICATA OF DECREE OF CHANCERY COURT.

The decree of the State Chancery Court, rendered at January Special Term 1900, for the identical taxes sought to be enjoined in this proceeding, in a suit by the State Revenue Agent against appellant and Yazoo & Mississippi Valley Railroad Company brought after the dismissal of the appeal by the Circuit Court of Appeals and before this appeal, adjudging expressly that said 21st Section of the charter of Natchez, Jackson & Columbus Railroad Company was void *ab initio* under the constitution of 1869; that said 21st Section in said charter was repealed by chapter 42, Act of 1875, p. 66 *supra*, that Chapter 11, Acts of 1878, page 87, *supra* operated as a repeal of said chapter 116, Acts of 1878, p. 233 purporting to re-enact said 21st section, and that said chapter 116, Acts of 1878, p. 233 was void being violative of the constitution of 1869, and especially so because of the enactment of said chapter 11; that, if then existent said exemption was

repealed by chapter 10, code 1880; that it is doubtful if chapter 22, Acts of 1884, p. 29, re-enacted said exemption, but if so, said chapter 22 was violative of said constitution in this regard: that if said chapter 22, re-enacted said exemption it was repealed by chapter 2, Acts of 1886, p. 23, and by chapter 2, Acts of 1890, p. 12: that if said chapter 2, Acts 1890, could be treated as recognizing said exemption as reenacted by said Act of 1884 such recognition was unconstitutional and void under said constitution of 1869: that said judgment of said Railroad Commission in making the assessment was *res adjudicata* and established conclusively the liability of said property to taxation and that said taxes had not been paid: that the decision of the State Court in said No. 244 was *res adjudicata* and established conclusively the liability of the property in controversy to taxation; and this decree is *res adjudicata* of the matters of this appeal.

1. An appeal from a decree dissolving an injunction does not affect the validity of the decree appealed from. *Slaughter House Cases*, 10 Wal. 273; *Hovey* vs. *McDonald*, 109 U. S. 150; *Planters' Bank* vs. *Calvit*, 3 S. and M. 143; *Kilpatrick* vs. *Dye*, 4, S. and M. 292.

2. Suit having been brought in the State Court after the discharge of the restraining order and decree having been rendered therein in the State Court for the taxes sought to be enjoined that decree is a bar to the further prosecution of this appeal. *Stout* vs *Lye*. 103 U. S. 68; *Case* vs *Beauregard*, 101 U. S. 688; *Mills* vs. *Green*, 159 U. S. 654-8 *Van Fleet Res. Adj.* p. 88, and cases.

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There are many other principles and citations pertaining to these Mississippi tax cases set forth in the briefs for appellees in said No. 318 and 320 of the docket of this court to which reference is made and which it is unnecessary to repeat here.

For these reasons this appeal should be dismissed: but if there should be found color for the appeal, the decree should be affirmed.

S. S. Calhoon
~~S. S. CALHOON~~,
Marcellus Green
~~MARCELLUS GREEN~~,

Of Counsel for Appellees, except Y. & M. V. R. R. Co.

No. 319. 78

Appx. to Br. for Appellees.

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Filed April 7, 1900.

In the
SUPREME COURT OF THE UNITED STATES
NO. 319.

OCTOBER TERM, 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant.

vs.

WIRT ADAMS, STATE REVENUE AGENT AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.,
Appellees.

"Opinion of the Supreme Court of Mississippi, rendered on March 27, 1899 in case No. 9358, styled The Yazoo & Mississippi Valley R. R. Co. et al., vs. Wirt Adams, State Revenue Agent, use, etc., on pages 355-358

COPY BOUND CLOSE IN CENTER

STATE OF MISSISSIPPI,
Office of Clerk of the Supreme Court.

I, E. W. BROWN, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that I have examined the opinion on pages 356, 357 and 358 herewithin, the same being part of the Southern Reporter, and that the same is a full true and correct copy of the opinion of the said Supreme Court of Mississippi in case No. 9358 (as corrected in said Reporter) therein styled Yazoo & Mississippi Valley Railroad Company et al., vs. Wirt Adams State Revenue Agent—use etc.,—as fully as the same appears of record and on file in my said office.

Given under my hand, and the seal of said Court at Jackson, Mississippi, in my said office on this 21 day of April A. D., 1900.

E. W. BROWN,
Clerk of the Supreme Court of Mississippi.

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Vol. 25. WEDNESDAY, APRIL 26, 1899. No. 6.

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VOL. 9, CENTURY DIGEST,

Ready first part of May.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT; THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Statement and Brief for the Appellees on Motion to Dismiss or Affirm and on the Merits.

STATEMENT.

This is an injunction suit by the appellant, The Illinois Central Railroad Company, against The Mississippi Railroad Commission and State Railroad Assessors and their Clerk, and the State Revenue Agent, and The Yazoo and Mississippi Valley Railroad Company, in the circuit court of the

United States for the southern district of Mississippi, to prevent the approval and certification of an assessment, and to prevent a suit for taxes by said revenue agent on what was formerly the property of the Natchez, Jackson and Columbus Railroad Company, purchased by the Louisville, New Orleans and Texas Railway Company in 1890, and now belonging to said Yazoo and Mississippi Valley Railroad Company by virtue of a consolidation between said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, under the name of the present Yazoo and Mississippi Valley Railroad Company, on October 24, 1892.

The taxes in controversy are back taxes from 1886 to 1891, inclusive, which the revenue agent sought to have said railroad commission to assess and which they did assess on August 1, 1898, after notice to said Yazoo and Mississippi Valley Railroad Company, and its answer and objections heard and overruled, and the assessments were ordered to remain on file for thirty days for the filing of any objections thereto.

Record, p. 95.

On August 4, 1898, this bill was filed and a temporary restraining order made, and on August 5, 1898, the temporary restraining writ was issued and served.

Record, pp. 34, 35.

The matter was continued along by consent until in January, 1899, the revenue agent and railroad commission and their clerk made a motion to discharge the restraining order, and the plaintiff a counter-motion for an injunction.

Record, pp. 89, 90.

The motion to discharge the restraining order and refuse the injunction was as follows:

"1st. They have no authority to distrain or levy on or sell anything for said taxes, and were, and are merely per-

forming the duties enjoined upon them by and under the laws of Mississippi, and an injunction against them or any of them is a suit against the State of Mississippi and forbidden by the 11th amendment to the Constitution of the United States.

"2nd. Said railroad commission, in making said assessments act judicially and cannot be enjoined, and said revenue agent cannot act until after said assessments are made, approved, and the rolls sent to the various counties as required by the laws of Mississippi.

"3rd. Said injunction was prematurely applied for.

"4th. Plaintiff has shown no right to file the bill in this case under the 94th equity rule or otherwise.

"5th. This court has no jurisdiction.

"6th. The plaintiff is not entitled to an injunction on the facts shown in the bill.

"7th. There is no equity on the face of the bill."

Record, p. 89.

On February 7 the court discharged the restraining order and refused the injunction in the following order:

"This cause came on to be heard on the motion of the defendants, except The Y. & M. V. R. R. Co., to discharge the restraining order heretofore granted, and to refuse the injunction, and on the motion of the complainant to grant an injunction as prayed for in the bill, and both motions were heard together by consent, notice on both sides being waived, and the court after hearing the pleadings, exhibits and evidence pro and con and arguments of counsel on both sides, after due consideration finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered and so ordered, adjudged and decreed, that the motion to discharge the said restraining order is sustained and said restraining order discharged and the injunction refused. It is further ordered that said motion to grant an injunction is overruled, and the injunction refused."

Record, p. 128.

An appeal was prayed and allowed from this interlocutory order on February 9, 1899, to the United States circuit court of appeals for the fifth circuit, at New Orleans, and said court, on April 25, 1900, dismissed the same, *ex moro motu*, for want of jurisdiction.

Record, pp. 130, 133.

Then, on May 1, 1899, which was the first Monday of May and the first day of the next term of the circuit court, the said defendants, appellees here, made a motion to dismiss the bill on the ground that "the sole object of the bill was for an injunction, as shown therein, which injunction was refused by this court, and from the decree refusing said injunction an appeal was prayed to the United States circuit court of appeals for the fifth circuit; which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court, now here shown to the court."

Record, p. 133.

This motion was sustained and the bill dismissed, and the plaintiff prayed and obtained an appeal to this court.

The petition for appeal is under "section 5 of the act of Congress of the United States approved March 3, 1891," and prays an appeal "from the final decree refusing jurisdiction of the cause."

Record, pp. 133, 134.

The order granting the appeal specifies that "this appeal is granted solely on the question of jurisdiction, this court having refused to assume jurisdiction in this cause."

Record, p. 135.

And the assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 134.

The certificate of the judge was under the fifth section of the judiciary act of March 3, 1891, reciting the substantial contentions of the bill, the issuance of the restraining order; that one of the grounds of the motion to discharge the same was "that the court had no jurisdiction to issue the same or to entertain the cause;" that said motion was sustained, the restraining order discharged, and injunction refused, and that on May 1, 1899, on motion of said defendants, a final order was entered dismissing the bill (Record, pp. 136–140), and the judge certifies that in said cause the jurisdiction of the court was in issue upon said grounds, namely:

"1st. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that complainant's interest was derivative through said Yazoo and Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making said Yazoo and Mississippi Valley Railroad Company a party defendant in the cause.

"2d. That the complainant by its original bill showed no jurisdiction in this court because of the subject-matter stated, inasmuch as the bill set forth no Federal question.

"3d. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the eleventh amendment of the Constitution of the United States."

Record, p. 140.

The substance of the bill, so far as it is material to the three certified questions, is as follows:

1st. In relation to the first certified question, that no jurisdiction is shown by reason of diversity of citizenship, the bill shows that the Mississippi Valley Company was incorporated in 1872, and that in 1876 the said Illinois Central Railroad Company acquired all but four shares of its stock, and that in April, 1892, the said Mississippi Valley Company purchased 37,539 of the 48,242 shares of the capital stock, and that said Illinois Central Railroad Company

at the same time purchased $13,805,000 of the $16,900,000 first-mortgage, $8,731,000 of the $10,000,000 second-mortgage, and $8,347,000 of the $10,000,000 income or land-grant bonds of said Louisville, New Orleans and Texas Railway Company, all of which were paid for with $20,000,000 out of a $25,000,000 issue of 4 per cent. mortgage bonds of said Illinois Central Railroad Company, using the Louisville, New Orleans and Texas Railway bonds as collateral to said Illinois Central issue.

Paragraphs 12 and 13, Record, pp. 17–19.

It then recites the purchase of the said Natchez, Jackson and Columbus railroad in March, 1890, by the said Louisville, New Orleans and Texas Railway Company under the act of February 19, 1890 (Laws of 1890, p. 675), and the consolidation, on October 24, 1892, between the said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, by which the present Yazoo and Mississippi Valley Railroad Company was formed.

Paragraphs 9 and 15, Record, pp. 12 and 20.

The charter of said Mississippi Valley Company, showing that its capital stock was one thousand shares, and the said deed of consolidation are made parts of the bill and appear in the Record at page 99, section 5.

On the hearing of the motions to discharge the restraining order and for an injunction, the judge's minutes show that the charter of this Mississippi Valley Company was introduced in evidence, and also the opinion of the State supreme court of November 22, 1898, in the case styled Wirt Adams, State revenue agent, appellant, *vs.* The Yazoo and Miss. Valley R. R. Co. *et al.*, appellees, and this is also shown by the agreement of counsel as to the court of appeals record.

Record, pp. 90, 91.

This opinion is not copied in this record, but is in the record in the case referred to, now pending in this court on a writ of error to said State court, under the style and number of the October term, 1899, of this court, No. 244, The Yazoo & Mississippi Valley Railroad Co. *et al. vs.* Wirt Adams, State revenue agent, and in that opinion, in that record, on page 647, it is shown that at the time of the consolidation, on October 24, 1892, there were 6,000 shares of stock of the original Yazoo and Mississippi Valley Railroad Company and 50,000 shares of the stock of the said Louisville, New Orleans and Texas Railway Company, showing that the 37,592 shares owned by the Mississippi Valley Company was a majority of the whole.

The bill also shows that the aggregate amount of taxes would be more than $50,000, but leaves the amounts due the State and each county and town $——.

Paragraph 16, Record, pp. 21, 22.

NOTE.—We do not refer to this as a technical defect alone that might be remedied by amendment, but to call the attention of the court to the fact that until the assessment was completed and approved, it was impossible to specify what the taxes would be, and that hence the plaintiff had shown no right to invoke the jurisdiction of the court.

2d. As to the third certified question, that it is a suit against the State, the bill prays for an injunction to enjoin the State railroad commission or assessors from approving and them and their clerk from certifying or sending the assessment-rolls to the various counties and towns in which the railroad is located, and to enjoin the State revenue agent from "beginning, by himself, his attorneys, solicitors or agents, or advising or inciting any of the counties and towns to begin any suit for the recovery of any judgment, or decree for said taxes, or for the enforcement of the alleged lien for taxes for any of the years mentioned in this bill, and from any proceeding looking to the subjection of the prop-

erty, * * * and that on the final hearing of this cause said injunction may be made perpetual, * * * and that the contract of exemption, as shown by the charter of the said Natchez and Jackson Railroad Company, and said section twenty-one of said Mobile and Northwestern charter as applied thereto by the act of 1870, be declared valid and binding, *both as to the State* and counties and municipalities therein *for the term of thirty years from the date of said charter.*" The italics are ours.

Record, pp. 33, 34.

3d. As to the second certified point—that no Federal question is raised by the bill—the bill is extremely long, critical, historical, and argumentative, but, stated as succinctly as possible, the following is its gist or gravamen:

1st. That by the act of August 8, 1870, the legislature conferred on said Natchez, Jackson and Columbus Railroad Company the benefits of the twenty-first section of the charter of the Mobile and Northwestern Railroad Company, which was as follows:

"SECTION 21. *Be it further enacted*, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the State will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value, which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said company, (and which agreement is irrepealable,) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which said company may have incurred in the construction of said road, or money borrowed by said company upon lands or otherwise, to be used in constructing said road, or paying debts incurred by said company in constructing the same; and it shall be the duty of the tax

collector in each and every year to give to said company a receipt in full for the amount of said taxes, upon receiving from said company an affidavit, made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year, in payment of the debts incurred, or money borrowed as aforesaid, and which receipt, so given, shall be in full of all taxes, State, county and municipal, to which said company shall be subject: *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law."

Paragraph 4, Record, pp. 5, 6.

2d. The purchase of said Natchez, Jackson and Columbus railroad, "with all its immunities," by the said Louisville, New Orleans and Texas Railway Company in March, 1890, under the act of February 19, 1890. This act is recited in the bill, paragraph 9, Record, pp. 12–14.

3d. The consolidation of October 24, 1892, between the said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, by which the present Yazoo and Mississippi Valley Railroad Company was formed.

Paragraph 14 and deed of consolidation, Record, pp. 19, 20, 43–46.

4th. It then recites the following provisions of the State constitution of December 1, 1869:

"ARTICLE XII.

"SECTION 13. The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals.

"SECTION 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."
Paragraph 4, Record, p. 5.

5th. It then recites what is known as the "factory act" of April 1, 1872, which is substantially the same as said section 21, except in four particulars, viz:

(*a.*) The said factory act is made to apply to "any and all manufacturing companies in this State whose capital stock shall not be less than ten thousand dollars paid in, not in operation before the passage of this act."

(*b.*) The part in brackets in said section 21, "and which agreement is irrepealable," is omitted in said factory act.

(*c.*) Only an annual dividend of 4 per cent. was allowed instead of the 8 per cent. in said section 21.

(*d.*) The factory act only exempts for ten years.
Record, pp. 7–8.

On April 17, 1873, the Mississippi mills having been burned down, in order to induce it to rebuild and prevent any doubt as to whether the act of April 1, 1872, would extend to its new factory, an act was passed expressly making the provisions of said act of 1872 applicable to it.
Mississippi Mills *vs.* Cook, 56 Miss., 43.

6th. The bill then goes on to show that in the year 1877 the legislature passed an amendatory act which provided that the said act of April 1, 1872, should not exempt from taxation "any property of any manufacturing company or manufactory, other than the paid-in capital stock of said companies, their machinery for manufacturing purposes, their manufactured goods and the buildings in which their machinery is located, and the grounds upon which their build-

ings are situated, or which may be within the necessary inclosure around such buildings," and that the said Mississippi Mills filed its bill to prevent Cook, the tax collector, from collecting taxes on its outlying lands, under this last act, on the ground that it impaired the obligation of the contract with it, and that on the trial of said case the supreme court of the State decided that the words "shall be subject to" in the constitution did not mean subjected to, but that said "provision is mandatory, not that the property of corporations shall be taxed (that is, left to the legislature), but such property shall ever be subject to—*i. e.*, liable to—be taxed if the legislature so wills;" that this decision was made in April, 1878, and had been followed and reaffirmed in many cases, and had been adopted and acted on by the legislature, and by the executive and judicial departments of the State, and by the officers and agents of the State, and had become a settled rule of property, and that enormous sums have been invested in the State on the faith of it.

Paragraph 4, Record, pp. 3–9.

7th. That while the charter of said Natchez, Jackson and Columbus Railroad Company was granted on July 21, 1870, and a part of the work done, yet the road was not completed till after said decision, and in reliance on it; that it was purchased by the Louisville, New Orleans and Texas Railway Company in 1890 under authority conferred by said act of February 19, 1890, and in reliance on said Mississippi Mills case and said constructions, and the further fact that the legislature had in 1886 and 1888 refused to repeal said twenty-first section.

Paragraphs 7, 9, and 10, Record, pp. 10, 12–16.

8th. It then claims that the exemption was recognized and preserved in that part of section 181 of the constitution of 1890 which says "exemptions from taxation to which corporations are legally entitled at the adoption of this con-

stitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," and by section 279, which provides that "all rights, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation, shall continue," &c.

Paragraph 11, Record, pp. 16, 17.

9th. It then relates that in April, 1892, the Mississippi Valley Company, of whose stock the said Illinois Central Railroad Company owned all but four shares, purchased 37,539 of the 48,242 shares of the capital stock of said Louisville, New Orleans and Texas Railway Company, and the said Illinois Central Railroad Company purchased $13,805,000 of the $16,900,000 of its first-mortgage, $8,731,000 of the $10,000,000 of its second-mortgage, and $8,347,000 of the $10,000,000 of its income or land-grant bonds; all of which the said Illinois Central Railroad Company paid for, both bonds and stock, with $20,000,000 of its own 4 per cent. gold bonds and issued an additional amount for purposes of betterments, so as to make the total issue $25,000,000, relying on said adjudications and legislation aforesaid, and that said Illinois Central Railroad Company, by a certain trust deed of September 1, 1892, placed all said bonds "*purchased by it, as aforesaid*," including the collateral bonds, $1,250,000 of the Natchez, Jackson and Columbus Railroad Company, purchased by the Louisville, New Orleans and Texas Railway Company, with $800,000 of its said first-mortgage bonds, amounting to a par value of over $34,000,000, with the United States Trust Company of New York *as collateral security for the payment* of its own said issue of $25,000,000.

Paragraphs 12, 13, and 19, Record, pp. 17–19, 25–30.

10th. "That on October 24, 1892, the said Louisville, New Orleans and Texas Railway Company and the original

Yazoo and Mississippi Valley Railroad Company effected a consolidation, whereby the existence of the said Louisville, New Orleans and Texas railway was merged into that of the Yazoo and Mississippi Valley Railroad Company and all of the property, real and personal, and all the rights, privileges and franchises, and immunities of the said Louisville, New Orleans and Texas Railway Company were transferred to and became the property, rights, privileges, franchises, and immunities of the said Yazoo and Mississippi Valley Railroad Company," all "on the faith of the previous adjudications and legislative and constitutional enactments hereinbefore stated;" and the said articles of consolidation are made a part of the paragraph as Exhibit C.

Paragraph 14, Record, pp. 19, 20, 43.

11th. It is then claimed that in the case of Railroad *vs.* Lambert, 70 Mississippi Reports, the State supreme court held that said section 21 was valid and passed in the sale to the Louisville, New Orleans and Texas Railway Company, and in the consolidation to the Yazoo and Mississippi Valley Railroad Company, and that orator, relying on said decision, paid out more of its said issue of $25,000,000 in bonds to pay debts, and for betterments and improvements.

Paragraph 14, Record, pp. 19, 20.

12th. It is then recited that the said State revenue agent, acting under and by virtue of the authority conferred on him by chapter 126 of the Annotated Code of 1892, as amended by the act of 1894, inaugurated and conducted certain suits against orator and said Yazoo and Mississippi Valley Railroad Company for the taxes of 1892, 1893, 1894, and 1895, "*but not including any taxes upon property that had formerly been property of the Natchez, Jackson and Columbus Railroad Company,*" and that the State supreme court expressly overruled the said Mississippi Mills and Lambert cases, "and held that the constitution of 1869 meant that

the property of corporations for pecuniary profit should actually be subjected to taxation," "and did in express terms declare that said section 21 of the Mobile and Northwestern Railroad charter was unconstitutional and null and void *ab initio*," and that *such decision* and action upon the part of the supreme court, when sought to be practically applied, is in conflict with section 10, article 1, and the fourteenth amendment to the Constitution of the United States.

Paragraph 15, Record, pp. 20, 21.

13th. It is then recited that said revenue agent, relying on said decision, applied to said State railroad commission, "*under said law of 1894*," to assess the property in controversy for back taxes for said years 1886–1891, inclusive, and that said railroad commission did proceed to assess the same at a valuation of $5,000 per mile of track for the years 1886–1890, and $9,000 for the year 1891, aggregating as follows: "For the county of Hinds, $——," &c.

Paragraph 16, Record, pp. 21, 22.

14th. Then it is claimed that "the assessments of taxes hereinbefore mentioned, when made as the railroad commission threatens to make the same," are required to be sent down to the counties and towns, and that the *said assessment when made* will constitute a lien "preferential in law to all mortgages and other liabilities, and will cast a cloud upon the title," &c.

Paragraphs 23 and 24, Record, pp. 31, 32.

15th. It is not denied that the property had previously escaped assessment or that the affidavits had not been made and receipts obtained, as required by said twenty-first section, but claims "that the failure to assess was the failure of the State's own officers, whose duty it was to assess the said railroad property for taxation, and for their failure to do so the railroad company was not responsible, nor were

its successors so responsible," and claims that this is all immaterial because the Louisville, New Orleans and Texas Railway Company purchased in 1890 without notice of any claim for the unsatisfied liability of the years 1886–1889, and the consolidated company took the property on October 24, 1892, without any notice of the unsatisfied claim for taxes for the years 1890, 1891, and it is expressly averred that the scheme of said twenty-first section was intended by the legislature to be worked out each year, and affidavits made in each year, &c.

Paragraphs 17 and 18, Record, pp. 22, 25.

16th. Another peculiar claim is set up in the bill. It is as follows: That although the supreme court of Mississippi in the various decisions referred to had denominated the said privilege of section as "exemption from taxation the railroad companies interested in that question have never accepted that view, and your orator does not admit it," but claims that it is "a contract within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract," and "which the legislature itself could not repeal, and still less could it be set aside or abrogated by a change of the judicial decisions of this State."

Paragraph 10, Record, pp. 15, 16.

The peculiar efficacy of this twenty-first section is said to be that it "is in the form of an appropriation, made by the legislature out of its public treasury," "the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities."

Paragraph 4, Record, p. 6.

NOTE.—In laying down this definition the drawer of the bill seems to have overlooked section 5 of said article 12 of

said constitution of December 1, 1869, which provides that—

"SEC. 5. The credit of the State shall not be pledged, or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association."

See Code of 1880, pp. 35, 36.

17th. And the plaintiff, in order to show there was no *subsequent law* repealing their alleged exemption or appropriation, devotes a paragraph of their bill, which is as follows:

"Your orator shows that under the settled law so construed and acted upon, as aforesaid, the successive legislatures always, including those of 1886, 1888, 1890, 1894 and 1896, as your orator is informed, refused to repeal *exemptions* granted as aforesaid, in charters, and at the last session of the legislature of said State, held during the present year 1898, although the governor in his message urged it to pass a statute repealing an exemption granted in a railroad charter in 1882, and although a bill for that purpose was introduced and urged upon it, yet the legislature steadfastly refused to pass such bill into a law, and defeated said measure so introduced."

Paragraph 6, Record, pp. 9, 10.

18th. Paragraph 22 of the bill sets forth the foregoing decisions, acts, &c., as an *estoppel in pais*.

Record, p. 31.

19th. And paragraph 21 expressly pleads the said Lambert case as *res adjudicata* as against the State and Adams county, and also as against the towns and the other counties, on the ground that "they derive the right to levy taxes alone by delegation from said State."

Record, p. 31.

20th. The prayer of the bill is to enjoin "the said railroad assessors aforesaid, from approving, and the said assessors

and their said clerk, from certifying said assessment for taxes * * * to the several counties * * * or cities and towns," and to enjoin the said Wirt Adams, State revenue agent aforesaid, "from beginning, by himself, his agents, attorneys or solicitors, or advising or inciting any of the counties, or towns, to begin suit for the recovery of any judgment or decree for said taxes, or the enforcement of the alleged lien for taxes for any of the years mentioned in this bill, and from taking any proceeding looking to the subjection of said property * * * to the payment of the taxes so claimed for said years or any of them," and that on the final hearing said injunction be made perpetual, "and that the contract of exemption as shown by the charter of the said Natchez and Jackson Railroad Company and said section twenty-one of the said Mobile and Northwestern charter as applied thereto by the act of 1870, be declared valid and binding both as to the State and counties and municipalities therein for the term of thirty years from the date of said charter," &c.

Record, pp. 33, 34.

The appellee Wirt Adams has made and filed an affidavit here to the effect that after the restraining order was discharged, writ quashed, and injunction refused he brought his bill in equity in the chancery court of Hinds county, Mississippi, against said Illinois Central and Yazoo and Mississippi Valley Railroad Companies, to which said defendants filed their answer, and that such further proceedings were thereupon had that in February, A. D. 1900, a final decree was rendered therein in favor of complainant and against said defendants, establishing a lien on said property for said taxes, and that said decree stands in full force and virtue and is claimed to be *res adjudicata* and to render this appeal unnecessary and abortive.

See affidavit on file.

The court will take notice that in this appeal no supersedeas was applied for or granted.

Record, pp. 133–135.

Points Involved.

From the foregoing statement it will be seen that there are four main points involved:

1st. When an injunction has been refused on a pure injunction bill, and the things have been done that were attempted to be enjoined, and an appeal afterwards taken to this court without supersedeas or in any manner reinstating the restraining order, whether this court should not dismiss the appeal as entirely unnecessary and improper.

2d. Whether this court has any jurisdiction under the first or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, when the record and first certified question shows that one of the grounds on which the bill was dismissed related to the right of the plaintiff to bring the bill as sole plaintiff.

3d. Whether the second certified question, that the bill set forth no proper Federal question, was not a correct finding.

4th. Whether the third certified question, that it was a suit against the State, was not a correct decision.

BRIEF.

First Point.

The appellant had filed a bill to prevent the State assessing board from completing and approving an assessment on the property for back taxes from 1886 to 1891, inclusive, and to prevent the State revenue agent from bringing suit on the assessment. While a considerable amount of talk is indulged in about the sheriffs and tax collectors seizing the property, yet the bill on its face shows that this was not done in good faith, for the sheriffs and tax collectors are not even made parties.

The question before this court is whether, when the injunction against the assessing board and revenue agent has been refused, and the assessment made and suit brought on it by the revenue agent, and appeal afterwards taken to this court without supersedeas, and the object and purpose of this suit rendered vain and nugatory, and especially when the appellant has been deprived of no substantial right, but has a complete and adequate remedy by a writ of error, if there is any Federal question involved, and it should be decided against them by the State supreme court, whether this court under such circumstances will entertain this appeal, when apparently nothing can be accomplished by it, for if this court should reverse the court below and hold that the injunction should have been granted, the stubborn fact remains that it was not granted, and the suit was properly brought by the revenue agent, and under section 720 of the Revised Statutes he cannot be enjoined from prosecuting it after it is brought, which renders the further prosecution of this suit entirely unnecessary.

The State supreme court in another injunction bill by these same parties, the Illinois Central and Yazoo and Mis-

sissippi Valley Railroad Companies, in exactly the same kind of a case, has held that the railroad commission or assessing board could not be enjoined from making the assessment.

Railroad Companies *vs.* Adams, 73 Miss., 662, 663.

And after the assessment was made they have held that the exclusive remedy was by a certiorari.

See late opinion, No. 9358, Yazoo and Mississippi Valley and Illinois Central Railroad Companies *vs.* Wirt Adams, decided March 27, 1899, copy on file.

And this court has decided that decisions like these raise no Federal question.

North. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.
Yesler *vs.* Washington, &c., 146 U. S., 646, 657.

And if this court should reverse this case those opinions of the State court could be set up and used in this suit as well as in that in the State court, and whether made before or pending this appeal.

Oakes *vs.* Mase, 165 U. S., 363, 364.
Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.
Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.

Hence we claim that in any light in which this case can be viewed this appeal is entirely unnecessary and useless.

Dixon *vs.* Greene, 76 Miss., 794.
Mills *vs.* Green, 159 U. S., 651.
See also our briefs on this point in Nos. 318 and 320, pages 15–17 and 11–15.

1st Certified Ground.

This is evidently based on the fourth ground of the motion to discharge the restraining order and refuse the injunction, that "the plaintiff has shown no right to file the bill in this

case under the 94th equity rule, or otherwise," followed by the motion to dismiss the bill on the ground "that the sole object of said original bill was for an injunction as therein shown, which injunction was by this court refused," &c., and which was sustained in the order or decree dismissing the bill.

Record, pp. 89, 128, 133.

It must be borne in mind that whatever rights the Illinois Central Railroad Company has are entirely *derivative*. It has no independent right to sue, for it is plain that any rights it has must be claimed under and through the charter of the Yazoo and Mississippi Valley Railroad Company as consolidated, for this court well say *there can be no irrepealable contract right where there is no irrepealable contract*. It has no standing to enforce anything except the charter rights of the Yazoo and Mississippi Valley Railroad Company, *and for and in place of that company*.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

There is no proper diversity of citizenship, and it is difficult to find on what theory the Illinois Central Railroad Company filed the bill as sole plaintiff.

1st. It tries to set up some undefined interest as a stockholder, but to this there are three answers:

(*a.*)

If it was a direct stockholder it has shown no ground whatever to file the bill. It has shown no effort whatever to induce the Yazoo and Mississippi Valley Railroad Company to file or that said company had ever been requested or refused to file it, and the Illinois Central Railroad Company could not put forward any such pretense, for it admits that it owns all but four of the shares of the Mississippi

Valley Company, and the Mississippi Valley Company owns a majority of the stock of the Yazoo and Mississippi Valley Railroad Company.

It affirmatively shows that it has a controlling interest in the Yazoo and Mississippi Valley Railroad Company, and hence it has no standing as the plaintiff in a court of equity, and this before and without any regard to the ninety-fourth equity rule, which was only designed to make the general equity rule already prevailing more stringent, and more effectually block these attempts to commit a fraud on the jurisdiction of the Federal courts in just such cases as these.

Hawes *vs.* Oakland, 104 U. S., 450.
Taylor *vs.* Holmes, 127 U. S., 489.
Mount *vs.* Radford, 93 Va., 430, 431.
Decatur *vs.* Palm, 113 Ala., 531.
Warren *vs.* Shoe Co., 166 Mass., 97.
Ware *vs.* Bozeman, 58 Ga., 340.
4 Thompson, Comm. Law Corp., §§ 4476–4480.

The Illinois Central Railroad Company and the Yazoo and Mississippi Valley Railroad Company could not litigate against each other, and hence could not properly be placed on the opposite side of the docket, because the one has absolute control of the other.

Mills *vs.* Green, 159 U. S., 653.
Merritt *vs.* Bowdoin College, 169 U. S., 556.
Lake County *vs.* Dudley, 173 U. S., 251–254.
South Springs *vs.* Amador, 145 U. S., 301.
May's U. S. Sup. Ct. Pract., p. 45.

And they are not even attempting it, except theoretically, for the same attorney signs the papers for both in this same litigation, which shows that it is an attempt pure and simple to confer jurisdiction by collusion on account of diversity of citizenship.

Record, pp. 90, 91, 136.

(*b.*)

The stock was in the name of the Mississippi Valley Company, and if the bill could be filed by a stockholder, that stockholder would be the Mississippi Valley Company, and it is not made a party at all, either as plaintiff or defendant, the reason, we suppose, being that it was a MISSISSIPPI CORPORATION, for the Illinois Central Railroad Company, owning all but four shares of its stock, could have made it either the plaintiff or a defendant, as it chose, and the same rule applies, which we have just argued, that a stockholder cannot sue until he has requested the corporation and it has refused, and the Illinois Central could not sue until a request to and refusal by the Mississippi Valley Company.

(*c.*)

The bill shows that this Mississippi Valley Company bought 37,539 shares of the 48,242 shares of stock in the Louisville, New Orleans and Texas Railway Company in the month of April, 1892. This court may ask, Why this circumlocution? Why did not the Illinois Central Railroad Company buy the stock itself outright?

It was because of this little provision in section 197 of the constitution of November 1, 1890:

"SECTION 197. The legislature shall not grant to any foreign corporation or association a license to build, operate, or lease any railroad in this State; but in all such cases where a railroad is to be built or operated, and the same shall be partly in this State and partly in another State or States, the owners or projectors thereof shall first become incorporated under the laws of this State; nor shall any foreign corporation or association lease or operate any railroad in this State or purchase the same or any interest therein. Consolidation of any railroad lines and corporations in this State with others shall be allowed only where the consolidated company shall become a domestic corporation of this State. No

general or special law shall ever be passed for the benefit of any foreign corporation operating a railroad under an existing license from this State, or under an existing lease; and no grant of any right or privilege, and no exemption from any burden, shall be made to any such foreign corporation, except upon the condition that the owners or stockholders thereof shall first organize a corporation in this State under the laws thereof, and shall thereafter operate and manage the same, and the business thereof, under said domestic charter."

The object of this constitutional provision is very evident. It was to give the State control of its own corporations and prevent any discrimination or advantage in favor of foreign corporations, which were not equally available to its own citizens. This constitutional provision simply equalizes the matter and puts all on the same footing. They are all entitled to the protection of the United States Constitution against impairing the obligation of contracts and not being deprived of property without due process of law, and put on the same footing also as to effect of the decisions of the State courts as to the construction of their own laws and constitutions, and we do not think this court would permit the plaintiff to commit a fraud on the laws and constitution of Mississippi by conforming to their letter and violating their spirit.

A man cannot do indirectly that which he cannot do directly. The courts will dig down through the crust to the meat of the matter, and we do not think this court will permit the Illinois Central Railroad Company to use the Mississippi Valley Company to buy the stock in the Louisville, New Orleans and Texas Railway Company, as a domestic corporation, to conform to the constitution of Mississippi and then turn round and sue in the Federal court itself as a non-resident, in direct violation of the spirit, if not the letter, of that constitution.

All that a corporation can reasonably demand or expect

is that the State of Mississippi shall not deny to it the equal protection of the laws with its own citizens, but this court has decided that it is not included in nor entitled to the provisions of article 4, section 2, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," and hence a corporation has no right to violate the constitution and laws of a State and then run into the Federal court and secure advantages not extended by the State to its own citizens.

Blake *vs.* McClung, 172 U. S., 240, 259.

All that it can require is that it shall have the *equal protection* of the laws, and nothing more.

2d.

It is equally difficult to see how the Illinois Central Railroad Company can have any standing as a bondholder or creditor.

In the first place, its claim of an innocent purchaser is absolutely without foundation. In paragraphs 12, 13, and 19 of its bill (see analysis of bill in statement, *ante*, 9th) it purchased the greater part of the bonds and stock in April, 1892, before the Lambert case was decided, and in paragraph 15 (see analysis, *ante*, 12th) it recites that the State revenue agent instituted suits for the taxes of 1892 and 1893 and of 1894 and 1895, resulting in a decision of the Supreme Court finally on June 20, 1898, holding the so-called exemption void, so that they could not have depended on the Lambert case before it was decided, and have had notice not only by *lis pendens*, but by actual notice since.

This in passing, but the point we make here is that as a creditor they have no standing in a court of equity until they have reduced their claims to judgment, either under the rules of general equity practice or of this court or of

the State court, which only allows creditors at large to resort to equity in the first instance in case of fraudulent conveyances, and has no application to tax suits.

Van Weel *vs.* Winston, 115 U. S., 245, 246.
Cates *vs.* Allen, 149 U. S., 451.
May's U. S. Sup. Ct. Prac., p. 552.
Miss. Code 1892, § 503.

Their claim to sue as a bondholder is equally unfounded.

The bill shows that they only own $13,805,000 of the $16,900,000 of first-mortgage, $8,731,000 of the $10,000,000 of second-mortgage, and $8,347,000 of the $10,000,000 of income or land-grant bonds, thereby affirmatively showing that they do not own all of either set of bonds.

The rule in such cases is that before they are authorized to institute or prosecute suits for the safety or security of the trust estate they must first request the trustee of the mortgage and show a refusal by him.

Coal Co. *vs.* Blatchford, 11 Wall., 172, 177.
Stevens *vs.* Eldridge, 4 Cliff., 348.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Owens *vs.* Ohio, &c., R. R. Co., 20 Fed. R., 12, 13.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Ritchter *vs.* Jerome, 123 U. S., 246, 248.
Van Weel *vs.* Winston, 115 U. S., 245.
City of Atlanta *vs.* Grant, 67 Ga., 340.
5 Thompson, Comm. Law Corp., §§ 6126, 6209, 6210.
(4 ed.) 2 Perry on Trusts, § 885 and § 886, citing—
Reade *vs.* Sparkes, 1 Moll., 8.
Hughes *vs.* Key, 20 Beav., 395.

And if the trustee refuses to sue, it is absolutely essential that he be made a party defendant, and that the bondholders who do sue should sue on behalf of themselves *and all the other bondholders*, for the suit is to establish a general right common to all, and cannot be maintained by a single

bondholder. It must be in behalf of all to establish the general right, and the trustee must be a defendant so as to bind all and prevent a multiplicity of suits, which is the sole ground of equity jurisdiction to entertain a suit by one of a numerous party.

Wood *vs.* Draper, 24 Barb., 187.
Williams *vs.* County Court, 26 W. Va., 488.
Packard *vs.* Bd. County Com., 2 Colo., 338.
(3d ed.) 2 High on Inj., § 1560.
Winslow *vs.* Minn., &c., R. R. Co., 4 Minn., 316.
Barry *vs.* Mo., Kans. & Tex. R. R. Co., 27 Fed. R., 1, 2.
Morgan *vs.* Kans. Pac. R. R. Co., 15 Fed. R., 56, 57.
Carey *vs.* Brown, 92 U. S., 171, 172.

3d.

Another reason why the court as a Federal court had no jurisdiction is that paragraph 16 of the bill (Record, pages 21, 22) shows that the aggregate amount of taxes would be more than $50,000 for the twelve years; but there are the amounts of privilege taxes and of ad valorem taxes due the State *in each county*, and the amounts *due to each* of the five counties, and the amounts due to each of the nine towns, and there is nothing to show what would be due to each. The account is stated in blank, thus:

1. For the county of Hinds..... .... $
2. For the county of Copiah ..... $

&c., &c.

It does not show that as much as $2,000 would be due in any single instance, and it is certain that so much would not be due in many.

This court holds that so far as the jurisdiction of the Federal courts in suits to enjoin the collection of taxes is con-

cerned, the amounts due each must be treated as several, and the bill must show affirmatively the several amounts.

Citizens' Bank *vs.* Cannon, 164 U. S., 321, 322.
Fishback *vs.* West. Un. Tel. Co., 161 U. S., 99–101.
N. Pac. R. R. Co. *vs.* Walker, 148 U. S., 391, 392.
Walter *vs.* N. E. R. R. Co., 147 U. S., 371–374.
Washington *vs.* Dist. of Col., 146 U. S., 231, 232.
Holt *vs.* Indiana Mfg. Co., 176 U. S., 72, 73.

As said in the statement, *ante*, we call attention to this not as a technical and amendable defect merely, which, however, was never amended, but also to show that until the assessment was completed and approved the plaintiff could not tell what the taxes would amount to, and hence was forced to leave these blanks, and this court has no jurisdiction and the circuit court had no jurisdiction, not only because it is not shown what the different amounts of taxes were, but also because at that stage of the proceedings it could not be shown, and the decision of the State supreme court in Yazoo and Mississippi Valley R. R. Co. *vs.* Wirt Adams, 73 Miss., 648, 662–663, enunciated a sound principle of law, that the making of an assessment like this one could not be enjoined, and this court has expressly held that a decision like that presented no Federal question.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

In order to justify an appeal to this court on the question of the jurisdiction of the court below, it is necessary that that should be the CONTROLLING question, for if there are other questions on which the action of the court below can be sustained, then the decision on that question would amount to nothing. It was plainly the intention of this provision that an appeal could only be taken in cases where the decision of this court would either affirm or reverse the

decree of the court below, and not merely some of the grounds or reasons on which it was founded.

Carey *vs.* Houston, 150 U. S., 170, 181.

The jurisdiction meant is the jurisdiction *as a Federal court*, and not on grounds common to all equity courts.

Blythe *vs.* Hinckley, 173 U. S., 501.

Smith *vs.* McKay, 161 U. S., 357, 358.

And the question as to who is the proper party to bring the suit is not a Federal question, even though the merits of the suit itself may involve Federal questions, and this appeal should be dismissed.

Montgomery *vs.* Hernandez, 12 Wheat., 129.

Merritt *vs.* Bowdoin College, 169 U. S., 551, 556.

2d Certified Ground.

That No Federal Question Was Involved.

It is plain from the statement of the case *ante* that this case involves no Federal question.

In the twenty-first paragraph of the bill the Lambert case is pleaded as *res adjudicata*, but whether it is or not, or whether one judgment is *res adjudicata* in a subsequent suit, depends either on general principles of law or on the local practice and in neither case raises any Federal question.

Chouteau *vs.* Gibson, 111 U. S., 200, 201.

Phœnix Ins. Co. *vs.* Tenn., 161 U. S., 184–186.

In re Woods, 143 U. S., 202, 206.

N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

California *vs.* Holliday, 159 U. S., 415–417.

Hagar *vs.* California, 154 U. S., 639.

Wheeling *vs.* Wheeling, 138 U. S., 287.

San Francisco *vs.* Itsell, 133 U. S., 65.

Newport *vs.* Newport, 151 U. S., 527, 528.

Telluride *vs.* Rio Grande, 175 U. S., 639, 646, 647.

In the twenty-second paragraph the bill pleads the former decisions of the State court and acts of the State officers as *stare decisis*, a rule of property, and constituting an estoppel on the State. This has been frequently and expressly decided by this court to raise no Federal question. The doctrine of laches and estoppel have no application to a State.

Pierce *vs.* Somerset Railway, 171 U. S., 648–650.
United States *vs.* Kirkpatrick, 9 Wheat., 720.
Hansford *vs.* Davis, 163 U. S., 278.
Central Land Co. *vs.* Laidley, 159 U. S., 109–112.
United States *vs.* Tanner, 147 U. S., 663.
Vicksburg, &c., *vs.* Dennis, 116 U. S., 665.
Yazoo, &c., *vs.* Thomas, 132 U. S., 185.
State *vs.* Brewer, 64 Ala., 287.
Perry Co. *vs.* Selma, 65 Ala., 391.
Hannibal *vs.* City of Kansas, 81 Mo., 285, and cases cited.
Delaware, &c., *vs.* Commonwealth, 50 Pa. St., 399.
Wood *vs.* Brady, 150 U. S., 20–23.
Opinion of Mississippi supreme court in No. 244, pp. 664–671.

And this is all there is of it. The sixth and ninth paragraphs of the bill expressly state and claim that the legislature has never repealed this so-called exemption or appropriation.

Record, pp. 9, 10, 12–14.

So there is no subsequent law complained of, and so also it is immaterial, so far as this case is concerned, whether said twenty-first section is an irrepealable exemption on the face of it, and for that reason forbidden both by sections 13 and 20 of article 12 of the constitution of 1869 and the language of the Mississippi Mills case in 56 Miss. R., pp. 53 and 62, as held by the supreme court in said opinion of

November 22, 1898, and on said pages 53 and 62 themselves, the court saying on the latter page that "if the exemption is granted in the form of a contract in a charter, that is prohibited," or whether it is really an irrepealable appropriation of taxes, "the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities," as contended for in the fourth paragraph of the bill, and therefore forbidden by section 5 of article 12 of said constitution of December 1, 1869, which forbids the State to pledge or loan its credit to any corporation, in neither view is there any subsequent law or any Federal question. Mere assertion does not satisfy this court. If it did every case in the land could be brought here. There must be some *bona fide* color of a Federal question.

We call the attention of the court to the opinion or summary of holdings of the Mississippi supreme court on June 20, 1898, holding these railroad exemptions unconstitutional, and also to the full opinion on that subject on November 22, 1898. They are in the record in No. 244, pages 513–515, and 659–671. Together they constitute a full and exhaustive review of that phase of the case.

And we beg of this court not to overlook the fact that the bill in this case was filed on AUGUST *5, 1898*, and that the State supreme court did not decide that exemptions were *repealed* till said full opinion of *November 22, 1898*.

See Record in No. 244, pp. 671–673.

So at the time the bill was written and filed there was no reason to state that the exemption had been attempted to be repealed, and it was not so stated, but, on the contrary, that it had not been repealed, and hence there could be no Federal question, as this court has often decided that the decision of the State court overruling its former decisions or deciding on the original invalidity of an exemption, in the absence of a subsequent law, raises no Federal question.

See also our Brief in No. 318, pp. 27–37.

3d Certified Ground.

But if this court should for any reason take jurisdiction, then we insist that the decree of the court below should be at once affirmed on either or both the last two grounds certified.

The third is that it is a suit against the State, which is the first ground of the motion to refuse the injunction, and hence included in the motion to dismiss the bill.

The order of the railroad commission or State railroad assessors, which was introduced in evidence, as shown by the judge's notes, shows that the said railroad assessors made a provisional assessment on August 2, 1898, "and on demand of said Yazoo and Mississippi Valley Railroad Company, by its attorney, it is ordered that said assessments so made remain on file for thirty days for the filing of objections thereto."

Record, pp. 90, 95.

And the twenty-third paragraph of the bill says that the assessment "*when made*" will be sent to the counties and towns, and the twenty-fourth paragraph says that said assessment "*when made*" will constitute a lien, &c.

Record, pp. 31, 32.

And the prayer of the bill is to enjoin the said railroad assessors "*from approving*," &c., and said revenue agent from suing for the recovery of any judgment or decree for said taxes.

Record, pp. 33, 34.

It is plain that, conceding the said twenty-first section to be valid, there are several questions of fact to be determined, among others:

1st. Was the railroad able to declare and pay the 8 per cent. dividend?

2d. Did it appropriate the taxes to the construction debts?

3d. Did it make the affidavits required by the charter?

4th. Did it file those affidavits with the tax collectors and get their receipts?

5th. Was the purchase of the $1,250,000 of bonds by the Louisville, New Orleans and Texas Railway Company with $800,000 of its own 4 per cent. bonds, as related in paragraph 7 of the bill, a novation of the debt, seeing that no interest was thereafter paid on the Natchez, Jackson and Columbus bonds, but only on this $800,000 of Louisville, New Orleans and Texas Railway bonds?

And yet it is proposed by the bill to take all these questions of fact and all other questions, either of law or fact, away from the regular assessing tribunal and try them in a court of chancery.

The State supreme court has decided that this cannot be done.

> Yazoo & Miss. Val. R. R. Co. *vs.* Adams, 73 Miss., 662, 663.

And this raises no Federal question and is decisive of this appeal and this case.

> N. Pac. R. R. Co. *vs.* Patterson, 154 U. S., 132–134.

Later that court decides that the railroad assessors in deciding these questions act JUDICIALLY, and that the statutory remedy by certiorari is exclusive, and refer to decisions of this court to the same effect. (See opinion in No. 9358, Yazoo & Miss. Val. R. R. Co. *et al. vs.* Wirt Adams, decided March 27, 1899, and not yet reported, on file in this case and in No. 318.)

As this court has decided that it cannot review a finding of facts by the State tribunal or its interpretation of local law, it would necessarily follow that it has no power to enjoin the State court *from finding the facts or interpreting the local law.*

Keokuk Bridge Co. *vs.* Illinois, 175 U. S., 631, 632.
Telluride *vs.* Rio Grande, 175 U. S., 639, 643–647.
Egan *vs.* Hart, 165 U. S., 188.

At all events, the revenue agent was improperly joined, and a chancery court will not undertake to conduct a suit with or against improper parties. The revenue agent from the outset insisted and still insists that the suit against him is a suit against the State, and, as the plaintiff did not see proper to dismiss as to him, the injunction was properly refused, and, no leave still being asked to amend, there was no other recourse but to dismiss the bill.

(3d ed.) 2 High on Inj., § 1613, citing—
Hudson *vs.* Maddison, 12 Sim., 416.
Jones *vs.* Garcia, &c., Turn. & R., 297.

The statute requires the revenue agent to sue in his own name, but for the use of the State, county, and town interested, and he is not to be liable for costs, and may sue either at law or in equity in any case where the State or the county or town could sue.

Annotated Code of 1892, § 4194.
Laws of 1894, p. 29, § 2.

In a similar case this court say that "a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract by forbidding all those acts and doings which constitute a breach of the contract, must also necessarily be a suit against the State. In such case, though the State be not nominally a party to the record, if the defendants are its officers and agents through whom

alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State."

In re Ayers, 123 U. S., 502, 503.

This is exactly what is attempted here, namely, to prevent the regularly organized tribunal, acting in a judicial capacity, from passing on the defenses set up by the State to the claim of exemption, and even to prevent the State, through its regular representative, from suing in the ordinary courts of the country.

This court say "it is not to be assumed in advance that Federal questions will arise, or that if they do arise, that they will be erroneously decided;" and if they are erroneously decided it can be corrected by this court on a writ of error.

In re Ayers, 123 U. S., 494, 495.

And they point out clearly the distinction between suits against the State and suits against its officers acting in a *ministerial capacity* and attempting to justify under an unconstitutional law.

Ib., pp. 506, 507.

This decision is approved in—

Hans *vs.* Louisiana, 134 U. S., 10.

And distinguished in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And is quoted in another case, where it is said the test is whether the State would be bound. It clearly would be in this case, for the final prayer of the bill is to decree the property to be perpetually exempt for the years named, and also to decree it to be a contract "valid and binding both as to the State and counties and towns therein for the term

of thirty years from the date of the said charter." It expressly asks the State to be bound.

Tindall *vs.* Wesley, 167 U. S., 219, 220, 223, 224.

This court can very well see that the claim in the twenty-third paragraph of the bill (Record, pp. 31, 32) that if the railroad commission and their clerk, *when the assessment is made*, are permitted to send the same down to the counties and towns, the tax collectors are required to collect the taxes by seizure of the property, and that hence orator is threatened with a multiplicity of seizures and suits, is not made in good faith, for the very next sentence (Record, p. 32) says that the revenue agent "threatens, in his legal capacity as the representative under the law of the State of Mississippi and of said counties and towns, to bring a suit for the recovery of the taxes so assessed," and paragraph 15 shows that the revenue agent did bring other suits, and the cases in this court just preceding and succeeding this, Nos. 318 and 320, in this court, tried at the same time, show that the revenue agent has brought the suits, and there is no foundation for the intimation that probably, under some circumstances, the tax collectors may seize the property.

The above allegation that the revenue agent, in his legal capacity, threatens to bring a suit is the gist of the whole thing, and shows plainly that this is an unmitigated attempt to sue the State and establish this as a contract against the State, and notwithstanding and against any defenses it may have, and is in violation of the eleventh amendment to the Constitution of the United States.

The principle in the *In re* Ayers case is approved and applied in the cases of Fitts *vs.* McGhee, 172 U. S., 524–528; Harkrader *vs.* Wadley, 172 U. S., 169, 170; Hagood *vs.* Southern, 117 U. S., 52.

Besides, on general principles a tax collector cannot be enjoined from bringing a suit for taxes in the ordinary courts of the country. It is unprecedented.

Archer *vs.* Terre Haute, &c., 102 Ills., 493.

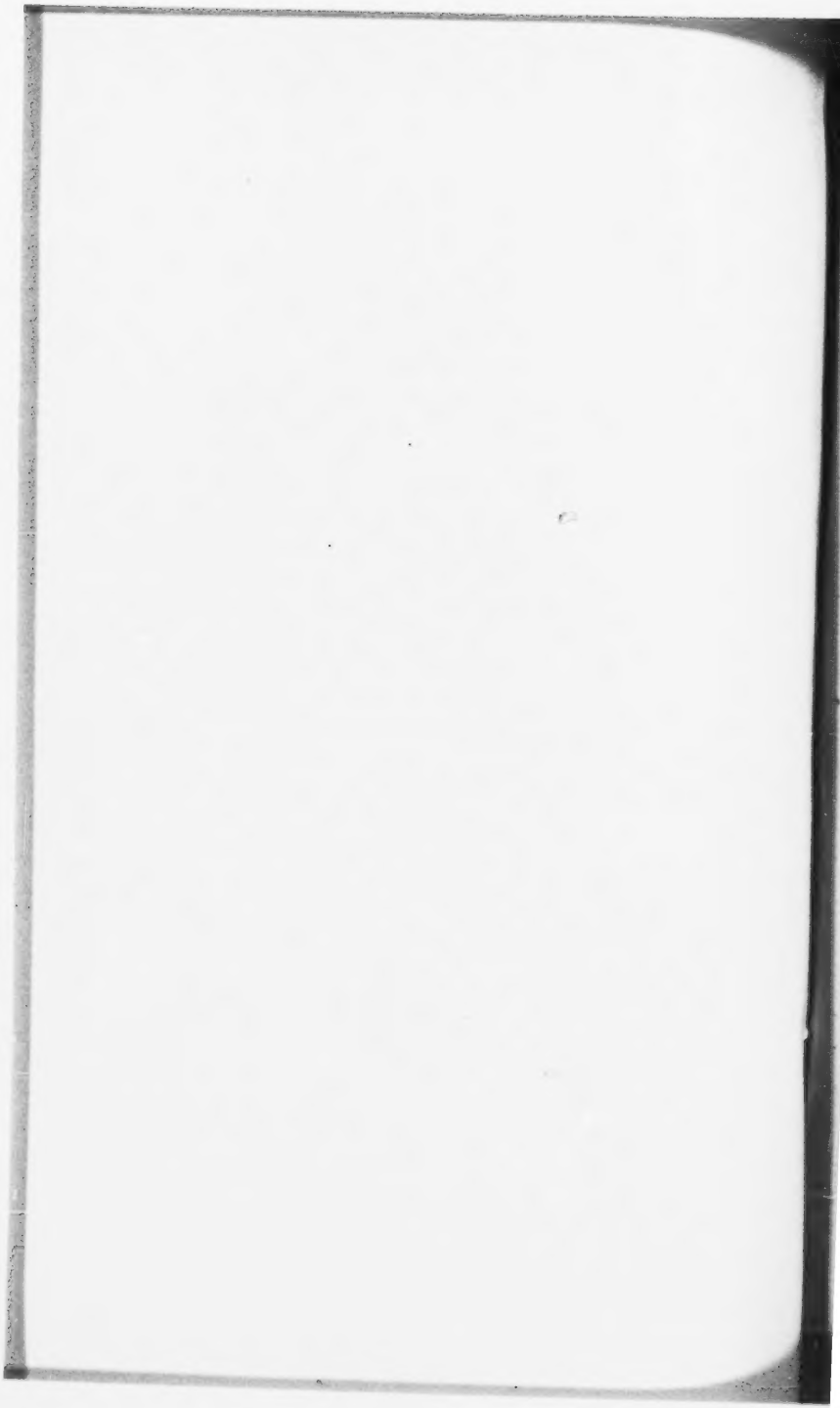
This case was tried at the same time and together with the preceding case, No. 318, and the succeeding case, No. 320, and for further discussion, if the court is not satisfied with this, we refer to the briefs in those cases, and for a full discussion we refer to the brief of associate counsel.

We ask the court to dismiss the appeal, or, if that cannot be done, to affirm the decree.

F. A. Critz,

R. C. Beckett,

Of Counsel for Appellees.



Office Supreme Court U.S.
FILED
OCT 11 1900
JAMES H. McKENNEY, Clerk.

No. 78.

Add'l. Brf. of Green for Appellees

IN THE

Supreme Court of the United States

Filed Oct. 11, 1900.

No. 78 October Term, 1900.

No. 319 October Term, 1899.

The Illinois Central Railroad Company,
APPELLANT.

vs.

Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, et al., Appellees.

Additional Brief in Support of Motion to Dismiss or Affirm.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs. { No. 319 October Term, 1899.
{ No. 78 October Term, A. D. 1900.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Additional Brief on Motion to Dismiss or Affirm for Appellees.

Errors in Statement of Case by Appellant.

In the statement of the case in the brief for appellant numerous errors occur:

1. On page 3 it is stated that the bill was filed "for the purpose of restraining the enforcement of the taxes for the years 1886 to 1891 inclusive, alleged to be imposed in violation of the contract clause of the Federal Constitution and of the Fourteenth Amendment (id. p. 21.)" This is erroneous in this: The bill was filed to restrain the Railroad Commission from *approving* and *certifying* the assessment of the taxes; and the Revenue Agent from bringing suit to enforce them when assessed. There is no averment in the bill that the "taxes" had been "imposed." On the contrary

the very object of the bill was to prevent their imposition. There is no averment that there was any statute violative of the Federal Constitution, under which the taxes were being imposed. The objection was that the Railroad Comsion, as State Railroad Assessors, was about to give effect to the *decision* of the State Supreme Court, in No. (244) 35, in making the assessment; and that the State Revenue Agent was about to bring suit for the enforcement of the assessment, and that such judicial proceedings would be violative of the Federal Constitution.

2. While the averments as to the decision of Mississippi Mills vs Cook, as stated on page 4, do occur, the bill does not count on the rule of exemption therein stated; but, on R. p. 15, states that said 21st Section is not an exemption and that it has never been treated as such; but that it is a contract of appropriation of the taxes which has never been within the prohibition of Sec. 13, Art. XII of the Constitution of 1869, and that now, for the first time, it is necessar toy have it defined.

3. On page 12 of said brief it is stated that the bill shows "the attempted impairment of these contracts by subsequent legislation of the State". This is erroneous. The bill does not aver that there had been any subsequent statute passed impairing the obligation of these contracts. It expressly avers that there had been no repeal of the exemption (R. p. 14); the matter complained of as violative of the Federal Constitution was the decision of June 20, 1898, in No. 244, in being applied and given effect by the proceedings to make and enforce the assessment. (R. 9, 10, 13, 20).

The Subsequent Suit in the State Court.

The suit for the taxes sought to be enjoined has passed into judgment in the State ~~Circuit~~ Court.

Appellant cites *Huntingdon v. Laidley*, 177 U. S. 668, as authority on this motion to dismiss. Here a restraining order was granted on the bill, and an injunction was moved for, and the Court, after hearing the evidence, discharged the restraining order and refused to grant the injunction. The only relief sought by the bill was the injunction of the proceedings to make and enforce the assessment. Its mission was to prevent the assessment being made, and the suit thereon being brought. When the assessment had been made and the suit had been brought and the judgment

rendered thereon, the bill to obtain the injunction became *functus officio*. No such question arose or was decided in *Huntingdon v. Laidley*.

Where no relief can be granted because of an event happening after the appeal, the proper course is to dismiss the appeal, (*Kimball v. Kimball*, 174 U. S. 163) "for the reason that its decision could not be made effectual by a judgment."

II

Jurisdiction of This Court.

Appellant relies upon *Shields v. Coleman*, 157 U. S. 176, and *Calvin v. Jacksonville*, 158 U. S. 458. In *Shields v. Coleman* the certificate expressly showed that the question of the jurisdiction of the Court was the sole and unmistakable question certified. The question was whether the jurisdiction of the Federal Court extended to the dispossession of a Receiver of the State Court, and the Court *a quo* had maintained the jurisdiction. This Court there says: "The record must affirmatively show that the trial Court sends up for consideration a single, definite question of jurisdiction," p. 177. In *Calvin v. Jacksonville*, supra, the clearly defined question was that of the jurisdictional amount—a condition precedent to the existence of jurisdiction. *In re Lehigh Min. & Man. Co.*, 156 U. S. 322, and *Interior Construction Co. v. Gibney*, 160 U. S. 219, and *Smith v. McKay*, 161 U. S. 357, are cited by appellant in No. 318, on this point. The first two cases arose on a plea to the jurisdiction, and, hence, the record itself made the certificate. In *Smith v. McKay*, the petition averred that the Court had held that it had jurisdiction; and ,hence, the jurisdiction of the Court as a Federal Court was necessarily affirmed. There was a motion to dismiss for want of jurisdiction in the Court below because the remedy at law was adequate. This Court dismissed the appeal because want of equity was not want of jurisdiction as a Federal Court. This is the very proposition insisted on by appellee here. In *Kirwan v. Murphy*, 170 U. S. 205-9, a temporary injunction had been *granted* and an appeal taken to the Circuit Court of Appeals, and the decree was there affirmed, and then an appeal was taken to this Court from the Circuit Court of Appeals; and it was held that as the decree appealed from was interlocutory no appeal would lie; but it seems that *certiorari* was the proper remedy. There the Circuit Court of Appeals did not decide whether the temporary injunction should be

made perpetual or not; but in the case at bar, when the Circuit Court discharged the restraining order and refused the injunction, after hearing the evidence, and an appeal from that decree was taken to the Circuit Court of Appeals, and that Court dismissed the appeal, a final decree was rendered by the Circuit Court of Appeals so far as that Court was concerned, whereby it refused to reverse the decree of the Circuit Court and left it in full force. The Circuit Court had, with the whole case before it, and upon a bill for an injunction, solely, discharged the restraining order and refused the injunction. That action was essentially final so far as the Circuit Court was concerned, and the Court of Appeals did not change this result, but by dismissing the appeal left that decree in full force. Such a decree was final *quoad hoc*, and from it an appeal would lie. (2 Ency. Pl. and Pr. p. 124.) *Kirwan v. Murphy*, supra, recites *Smith v. Vulcan Iron Works*, 165 U. S. 518, as holding that in a patent suit on appeal from an interlocutory decree granting an injunction and ordering an accounting the Court of Appeals might consider and decide the merits, and render or direct a final decree dismissing the bill, "and this course might be pursued in other cases, *Mills v. Green*, 159 U. S. 651." From such a decree in the Court of Appeals an appeal would lie to this Court by *certiorari*. So in the case at bar. The interlocutory degree in the Circuit Court, covering the whole case and refusing the only relief prayed, upon appeal to the Court of Appeals, was subject to its jurisdiction to decide the whole case; and to its power of certification of constitutional questions to this Court if it elected so to do; and when, with this full jurisdiction of the appeal, it erroneously, of its own motion, dismissed the appeal, the remedy of appellant was by *certiorari* from this Court to the Court of Appeals (*Am. Construction Co. v. Jacksonville R. R. Co.* 148 U. S. 384.) There exists no power in this Court now, on this appeal from the Circuit Court, to modify the decree of the Court of Appeals, whereby, in legal effect, was left adjudged every question of record within its jurisdiction. The reversal hereof the decree of the Circuit Court in its findings on Constitutional questions would be *brutum fulmen* as long as the questions of general equity jurisprudence and of the interpretation of the validity of the State statutes under the State Constitution decided by the Circuit Court remain unreversed by the Court of Appeals, or by this Court on an appeal from the decree of the Court of Appeals. In *Holt v. Indiana Mfg. Co.* 176 U. S. 68, there was a bill to restrain the collection of taxes on patent

rights upon the ground that patent rights were non-taxable by State laws, and that the statutes imposing the taxes violated the Federal Constitution. The Circuit Court maintained the jurisdiction and granted the relief as prayed; an appeal was taken to the Court of Appeals, and that Court held that the suit was not one arising under the patent laws, and that, as the jurisdiction could rest only on the ground that the State statutes violated the Federal Constitution an appeal did not lie to the Court of Appeals, and the appeal was dismissed; an appeal was then taken to this Court under Sec. 5 of the Act of March 3, 1891. This Court dismissed the appeal for want of jurisdictional amount in the Circuit Court. That case did not involve the question here. It did not involve jurisdiction in the Court of Appeals of the whole case. Only constitutional questions were involved. If, as decided, the Court of Appeals had no jurisdiction of the case, the appeal to that Court was merely abortive. In *Carter* v. *Roberts*, 177 U. S. 500, there was an appeal from the Circuit Court in a *habeas corpus* proceeding to the Circut Court of Appeals. The judgment was affirmed, and an application for a writ of error from this Court to the Court of Appeals was denied. An appeal was then taken directly from the Circuit Court to this Court upon the theory that the case involved the construction of the Constitution, and this Court held that whether an appeal should have been taken in the first instance from the Circuit Court to this court or not, that that appeal was not maintainable because the judiciary act of March 3, 1891 does not give the defeated party the right to have his case finally determined by both this Court and the Court of Appeals "on independent appeals," and that this Court could not entertain a direct appeal while the decree of the Court of Appeals was in force. The Court summarizes thus: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the Constitutional questions and afterwards proceed to judgment, or may decide the whole case in the first instance." The Act of March 3, 1891, does not contemplate, several separate appeals or writs of error, on the merits, in the same case (*Columbus Construction Co.* v. *Crane Co.*, 174 U. S. 600; *Cin. Ham. & R. R. Co.* v. *Thieband*, 177 U. S. 619.)

In *Huntingdon* v. *Laidley*, 177 U. S. 668, the Act of March 3, 1875, defining the jurisdiction of Federal Courts was construed by the Circuit Court adversely to the jurisdiction, and in such case the jurisdiction of the Court as a Federal Court was directly in issue. Jurisdiction was denied there because of the Federal statute. Regardless of the equity of the trust sought to be enforced the Court below found a denial of jurisdiction in the Act of Congress.

Certiorari to Court of Appeals was the proper remedy of appellant.

Am. Construction Co. v. *Jacksonville Ry. Co.*, 148 U. S. 384.

The Remedy to Restrain.

The remedy to restrain collection of taxes in Federal Courts was held not to exist where the tax was unconstitutional, and the failure to pay it operated as a forfeiture, and would produce a multiplicity of suits, where the remedy of payment under protest and suit to recover back existed (*Arkansas Building & Loan Association* v. *Madder*, 175 U. S. 272). In Mississippi a tax paid under compulsion may be recovered back. (*Tuttle* v. *Everett*, 51 Miss. 27; *Vicksburg* v. *Butler*, 56 Miss. 72; *Winona* v. *Bank*, 69 Miss. 663.) In *U. S.* v. *Parkhurst-Davis Co.* 176 U. S. 320, it is declared: "In the first place, the great object of the suit is to enjoin and stop litigation in the State Courts and to bring all of the litigated questions before the Circuit Court. This is one of the things the Federal Courts are expressly prohibited from doing. By the Act of March 3, 1793, it is expressly declared that a writ of injunction shall not be granted to stay proceedings in a State Court."

Validity of Retroactive Assessment.

Weyerhaueser v. *Minnesota*, 176 U. S. 550, reaffirms *Winona* v. *Minn.*, 159 U. S. 526, and holds that a proceeding, under a subsequent statute, to assess property, escaped taxation for former years, as against a subsequent purchaser where notice was provided for, was valid, and to the equitable defense of a *bona fide* purchase the Court says: "If the plaintiffs had been attentive to the assessment of the land its gross undervaluation could not have escaped their notice. Whether a party in a case has been refused the benefit of estoppel involves no Federal question," p. 559.

If in *Weyerhaueser* v. *Minn.* an actual assessment can be defeated under a subsequently enacted statute for gross

undervaluation the same principle would sustain subsequent revenue acts to subject property escaped taxation upon notice and full opportunity to be heard. This case is conclusive of the case at bar.

Since this case has been pending the Supreme Court of the State has upheld the contention of our brief (p. 74) that the Act of 1884 did not re-enact the exemption of the Natchez, Jackson & Columbus R. R. Co., and that the Lambert case erroneously held that it had restored it. (*Rec. Yazoo and Mississippi Valley R. R. Co.* v. *Adams*, No. 356, October Term, 1900, p. 209.)

In *L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 244, there was a writ of error to the State Supreme Court declaring the invalidity of an exemption from taxation under the Constitution of Florida, in substance like Section 13, Art. 12, Constitution of 1869, and it was contended that there had been a decision prior to the purchase by plaintiffs affirming the validity of the exemption and that upon the faith of this decision the purchase was made; this Court affirmed the last judgment and held that it was not bound by the first decision; and, especially not, because the first decision had not considered or adjudged the questions arising under the State Constitution decided by the later decision. This case is peculiarily applicable to the decision in No. 244 as applied to the Lambert case, and in the rule that should govern this Court in determining the effect of the Lambert case on the case at bar.

III

Suit Against the State.

That this is a suit against the State is conclusively shown by *Smith, Receiver*, v. *Reeves, Treasurer of California*, Mss. op. decided May 14, 1900.

For these reasons and those set forth in the original brief of Messrs Calhoon and Green and Critz and Beckett this appeal should be dismissed, or if color of jurisdiction appears then the decree should be affirmed.

MARCELLUS GREEN,
GARNER WYNN GREEN,
Of Counsel for Appellees.

No. 320. 79

FILED
SEP 27 1899
JAMES H. McKENNEY,
Clerk.

Brief of Beckett for Appellees (Mo

Filed Sept. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF SAME.

R. C. BECKETT,
Attorney for the Motions.

(17,434.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-27-'99

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Come all the appellees and move this honorable court to dismiss this appeal, first, because it is an appeal in an injunction suit, and the purpose and object of said injunction bill and suit have failed, and the questions herein involved have become *res adjudicata;* and, second, because this court has no jurisdiction of this appeal, or to affirm the decree, it being manifest that even if this court has jurisdiction the

said appeal was unnecessary and taken for delay only; and, besides, the questions on which jurisdiction depend are so frivolous as not to need further argument.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

NOTICE.

To Mr. EDWARD MAYES,
Attorney of Record for Appellant in the Above-entitled Case:

You are hereby notified that the appellees in the above-entitled cause will, on Monday the day of , A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm and the brief of the argument thereon, both hereto attached.

R. C. BECKETT,
Attorney for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1889.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Moseley, clerk of said circuit court of the United States for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above-named appellee, Wirt Adams, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he delivered in person to Mr. Edward Mayes, one of the attorneys for said appellant, The Yazoo and Mississippi Valley Railroad Company, in person, a true copy of the attached motion, notice, and brief of the argument, together with a copy of his affidavit on file, and brief of Marcellus Green.

Sworn to and subscribed before me this day of , 1889.

, *Clerk.*

, *Appellees.*

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

Statement and Brief on Motions to Dismiss or Affirm.

STATEMENT.

Unlike the two preceding cases, Nos. 318 and 319, this suit is brought in the name of the proper plaintiff, The Yazoo and Mississippi Valley Railroad Company, the owner of the property on which taxes are sought to be collected.

We do not think it necessary to make a long statement in this case for the court to properly understand the grounds on which the motions to dismiss or affirm are based.

It is an injunction bill brought by the appellant to enjoin the sheriffs and tax collectors of the various counties in which the railroad is located from distraining the property for the taxes, and to enjoin the revenue agent from bringing suit for the same.

It embraces two railroads—one formerly the property of the Natchez, Jackson and Columbus Railroad Company, which was purchased by the Louisville, New Orleans and Texas Railway Company in March, 1890, under the legisla-

tive act of February 19, 1890 (Laws of 1890, page 675), and the other the original Louisville, New Orleans and Texas railroad, all of which became the property of the appellant by a consolidation on October 24, 1892, between said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, under the name of The Yazoo and Mississippi Valley Railroad Company, the present appellant.

The taxes sought to be enjoined are the State, county, and municipal taxes for the year 1898.

The sheriffs and tax collectors all filed identical answers, as follows:

"I, —— ——, sheriff and tax collector of said —— county and one of the defendants in this suit, in answer to the bill say that I have not seized or levied on, nor am I about to seize or levy on, said railroad or property for taxes, and have not given said railroad company or its agents or officials any reason to believe that I was by threats or otherwise, and the application for an injunction against me in this case is unnecessary and uncalled for.

—— ——,

"*Sheriff and Tax Collector of —— County.*"

Record, p. 18, and agreement, par. 5, p. 20.

These answers were nowhere traversed or disputed. (See judge's note of evidence, Record, p. 19).

On the bill and these answers said sheriffs and tax collectors and said State revenue agent made a motion to discharge the temporary restraining order and refuse an injunction, and the plaintiff made a counter-motion to grant the injunction.

The motion of defendants was on the following grounds:

"1st. On the disclaimer of the sheriffs and tax collectors hereto attached and herewith tendered the granting of an injunction would be unnecessary and improper.

"2d. The said revenue agent has no authority to distrain, levy on, or sell anything, but only to sue in a court of competent jurisdiction for said taxes, and an injunction against him is a suit against the State of Mississippi and forbidden by the eleventh amendment to the Constitution of the United States."

"3rd. This court has no jurisdiction.

"4th. Plaintiff is not entitled to an injunction or any relief on the facts stated in the bill."

Record, pp. 18, 19.

This motion was sustained in the following order:

"This cause came on to be heard on the motion of the defendants to discharge the restraining order heretofore granted, and to refuse the injunction as prayed for in the bill, and both motions were heard together by consent, notice on both sides being waived, and the court, after hearing the pleadings, exhibits and evidence for and against, and arguments of counsel on both sides, after due consideration, finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged; and it is further ordered that said motion to grant an injunction is overruled and the injunction refused."

Record, p. 51.

From this order an appeal was taken to the United States circuit court of appeals for the fifth circuit, at New Orleans, which dismissed the appeal for want of jurisdiction.

Record, pp. 53, 56.

After this dismissal the defendants, at the May term of the circuit court, on May 1, 1899, made a motion to dismiss the bill on the ground "that the sole object of said original bill was for an injunction as therein shown, which injunction was refused by this court, and from the decree refusing said injunction an appeal was prayed to the United States circuit court of appeals for the fifth circuit: which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court now here shown to the court."

Record, p. 56.

This motion was sustained and the bill dismissed (Record, p. 56), from which decree this appeal is taken, and the judge certifies as follows:

He first recapitulates the allegations of the bill, of which the bill itself is the best evidence; then the grant of the restraining order, on December 17, 1898; then the motion of complainant for an injunction, as prayed in the bill, and the counter-motion of the defendants, The State Revenue Agent "and Railroad Commission and their Clerk" (this was a mistake, as it should be revenue agent and sheriffs and tax collectors), "to discharge the restraining order on the ground, amongst others, that the court had no jurisdiction to issue the same or to entertain the cause;" then recites the decretal order of February 8, 1899, discharging the

restraining order and refusing the injunction, and then the dismissal of the bill, on the motion of defendants (same mistake), on May 1, 1899, and then certifies:

"Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant by its original bill showed no jurisdiction in this court, because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"2. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi, and in violation of the eleventh amendment to the Constitution of the United States.

"The court having dismissed the bill on the ground of want of jurisdiction, the foregoing two questions arising upon the pleadings, the process and the evidence are hereby certified to the Supreme Court of the United States for its decision in conformity with the fifth section of the act of Congress of the year 1891."

Record, pp. 62, 63.

The only fault we find with the final decree dismissing the bill is that it orders us to go hence "*without delay*," like we were Filipinos.

Record, p. 56.

The order granting the appeal states that "this appeal is granted solely on the question of jurisdiction, the court having refused to assume jurisdiction in this cause."

Record, p. 58.

The assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 57.

The petition for appeal is under section 5 of the act of Congress of March 3, 1891, because the bill was dismissed "for want of jurisdiction."

Record, pp. 56, 57.

It is further shown by the affidavit of the appellee, Wirt Adams, State revenue agent, that after the restraining order was discharged and injunction refused, and an appeal to the circuit court of appeals was dismissed, and before the bill was finally dismissed or an appeal taken to this court, that the said revenue agent commenced two suits in the circuit court of Hinds county for the taxes of 1898 involved in this suit, one suit being for the taxes on the former Louisville, New Orleans and Texas railroad proper, and the other for the taxes on what was formerly the Natchez, Jackson and Columbus railroad, and that the issues were narrowed down by the pleadings in each case to two points: First, whether the assessment made by the railroad commission as State railroad assessors was *res adjudicata* and final; and, second, whether the case No. 2788, consolidated, being Nos. 8629 and 9251, and being No. 244 here, was *res adjudicata;* that both of said contentions were decided in favor of the revenue agent and a final judgment entered in his favor, from which an appeal by the appellants is now pending in the State supreme court, which is claimed as a bar to this appeal.

See printed affidavit, original on file.

BRIEF.

From the foregoing facts it is evident that there are four questions now involved:

1st. It being a pure injunction bill and the restraining order having been discharged and injunction refused, and the State revenue agent having commenced suits in the State court, where all defenses here set up can be fully availed of, both in the State supreme court and on writ of error from this court, and having obtained judgments in the State circuit court, which are now pending on appeals in the nature of writs of error to the State supreme court, whether that is not of itself a bar to this appeal, and whether a further prosecution of the same is not, under the circumstances, both unnecessary and improper?

2d. Whether an appeal lies to this court under the first class or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, where other questions are decided in addition to the question of the jurisdiction of the court below as a Federal court?

3d. Whether any proper Federal question is involved on the merits of the case?

4th. Whether the suit as it now stands is not a suit against the State of Mississippi?

FIRST POINT.

That this being an injunction bill and the injunction refused, and a suit having been brought and judgment obtained in the State court, from which a writ of error is now pending in the State supreme court, in which any Federal question can be reviewed by a further writ of error to this court, is not that judgment or those judgments a bar to the further prosecution of this appeal, rendering the same both unnecessary and improper? It may be claimed that the suits in the State court were brought and process served only the day after the circuit court of appeals had dismissed the appeal to that court, on April 25, 1899, and before the week expired within which, by the rules of that court, they were entitled to file a petition for rehearing, but it is settled law that it is the judgment or decree, and not the petition for rehearing or mandate, that controls. The party may have to take the risk of a rehearing or reversal, but that is all, and none was granted.

Foster *vs.* Jordan, 54 Miss., 509, 510.

Opinion of November 28, 1898, in the writ of error case in this court, No. 244, p. 678.

In re Jugiro, 140 U. S., 291.

Long *vs.* Perine, 44 W. Va., 243, 245.

2nd Ency. Pldg. & Prac., p. 332, § 7.

Barton *vs.* Long, 45 N. J. E., 161.

Atlantic, &c., *vs.* Lemar, 10 Paige, 505.

Burnett *vs.* Fouche, 79 Ga., 377.

If the appellant had desired the appellees to be prevented from bringing suit *pendente lite* he should have applied to the United States circuit court of appeals, which he did not do so far as the record shows, and if he did *in pais* it is evident that he met with a cold shoulder.

Jewett *vs.* Albany City, 1 Clarke Ch. (N. Y.), 59.
2 Ency. Pldg. & Prac., p. 332, § 7, n. 3.
In re Ayers, 123 U. S., 443.
Fitts *vs.* McGhee, 172 U. S., 524–538.

The pendency of a former suit must be set up by a plea in abatement and must be verified by affidavit, neither of which was done.

Vose *vs.* Reed, 1 Woods (C. C.), 647.
Simmons *vs.* Thomas, 43 Miss., 39, 40.
Moore *vs.* Cox, 46 Miss., 604, 605.
Fenwick *vs.* Grimes, 5 Cr. (C. C.), 603.
White *vs.* Whitman, 1 Curt., 494.
Stevens *vs.* Monongahela, 111 U. S., 197.
Bellamy *vs.* Oliver, 65 Me., 109.

And a plea of former suit pending has no application where the parties are reversed. It was only intended to prevent the same plaintiff from oppressing the same defendant with a multiplicity of suits.

New England Screw Co. *vs.* Bliven, 3 Blatchf., 240.
Paul *vs.* Hurlburt, 5 Reporter, 738.
Same case, 18 Federal Cases, 1345.
Seymour *vs.* Malcolm, 58 Fed. R., 961.
Same case, 7 C. C. A., 593.

The rule is that a writ of error does not suspend or affect the effect of a judgment as *res adjudicata*. For full discussion of this, see further on in this brief under the head of *res adjudicata*.

And the judgments in the State court can be used as *res adjudicata* here, although the suit in the State court was commenced after the suit in the circuit court of the United States, for that was a suit *in personam*, while the suits in the State court are where the court had full jurisdiction of the person and subject-matter.

Stout *vs.* Lye, 103 U. S., 66.
Oakes *vs.* Mose, 165 U. S., 363, 364.
United States *vs.* Dewey, 6 Biss., 501.
Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.
Bryar *vs.* Bryar, 78 Fed., 657.
Bank of U. S. *vs.* Merchants' Bank, 7 Gill (Md.), 415.
Paine *vs.* Schenectady, 11 R. I., 411.
Bank of N. A. *vs.* Wheeler, 28 Conn., 433.
McGilvray *vs.* Avery, 30 Verm., 538.
Rogers *vs.* Odell, 39 N. H., 452.
Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.
Memphis, &c., R. R. Co. *vs.* Grayson, 88 Ala., 572.
Same case, 7 Southern Rep., 122.
1 Chitty on Pldg., 454.
(1st ed.) 12 Am. & Eng. Ency. Law, p. 149 (*c*) and n. 3 and 4.
Weeks *vs.* Harriman, 18 Atl. R., 87 (1889, N. H.).

And it is well to remark that all distinctions between writs of error and appeals and all distinctions between judgments and decrees are abolished (Annotated Code of Mississippi of 1892). Section 31 abolishes all distinction between appeals and writs of error. Section 594 provides that all the effects of both shall be the same, and section 32 provides, in case of a final judgment or decree, "in no case shall such appeal be held to vacate the judgment or decree," and this whether there is supersedeas or not.

So this case is *res adjudicata* both for the same taxes involved here and, as we will show hereafter, by former judgments for the taxes of the years 1892–1897, inclusive; and one point we wish to impress here is that the sheriffs having disclaimed and the State revenue agent having actually brought suit at a time when he had a perfect right to do so, a reversal would prove abortive, and this appeal and suit have no further excuse for living. The sheriffs have not seized anything, and the State revenue agent has actually brought suit, where all questions involved here could be and were set up, and a judgment rendered in favor of the revenue agent, from which an appeal in the nature of a writ of error is now pending in the State supreme court, and from which any Federal question can be brought directly by a writ of error.

The fact that the suit was commenced in the Federal court first is a mere difference between tweedledum and tweedledee, for in either event this court has the last and paramount right to settle any Federal question that may be involved, and the bringing of the suit in the State court is evidence *per se* that the sheriffs and tax collectors have no intention to and cannot now resort to any summary process of seizure or distraint. The defendant now has all that it has asked, and cannot be prevented from raising or taking advantage of any Federal question it may be entitled to. It has a plain, untrammeled opportunity at law, and no excuse for invoking the aid of equity, and this appeal should be at once dismissed as being intended to tangle up and delay the trial of the case and cut the State out of that much interest, for taxes do not bear interest till after judgment.

and a reversal of this case and setting aside of the judgment in the State court on any mere question of practice would result in a loss to the State of at least six months' interest on about $113,000 and a bonus of that much to the appellant.

SECOND POINT.

That the appeal in this case is expressly prayed and granted and certified under the first class or jurisdiction-alone clause of the fifth section of the act of March 3, 1891, and as the record shows that the injunction was refused and bill dismissed on both Federal and non-Federal grounds, this court has no jurisdiction of such an appeal, and it should be dismissed.

We think the appeal in this case should be dismissed, not only—

1st. Because the certificate of the judge does not show that the two questions certified were the only questions on which the court acted, or that a reversal as to them would affect the decree in the least; but also—

2d. Because the record shows that there was another ground for the dismissal, which was non-Federal.

This court has held that an appeal does not lie to this court except from a final decree, and also that it was not the intention of the act of March 3, 1891, that this court should be called on to try cases piecemeal.

Columbus, &c., *vs.* Crane Co., 174 U. S., 600.

Kingman *vs.* Western Mfg. Co., 170 U. S., 680.

It is true that the first subdivision of the fifth section of that act provides that appeals may be taken to this court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;" but that, while on its face it would seem to justify an appeal where other questions are involved, must receive a reasonable construction and be held to apply to cases only in which the decision of this court, on *reversing* the ruling of the court below, would have some effect on the case.

For instance, if the court below should dismiss a case solely on the ground that there was no Federal question involved where the parties were all residents of the same State, a reversal by this court would restore the case to the docket to be proceeded with.

So also if the court below should dismiss solely on the ground that it was a suit against the State, or on this and the preceding ground combined. Other instances might be imagined on the side of the plaintiff.

Now take the defendant. If the court below should hold jurisdiction against the protest of the defendant in either or both of the above-supposed cases, or others, and should eventually render a decree *against the defendant*, and he did not care to contest the merits, he could appeal under this subdivision on the question of jurisdiction alone, although there might have been many questions involved and decided on the merits, for in those cases a reversal by this court of the lower court would result in a dismissal of the case.

But it is easy to see that if the lower court should dismiss a bill because it had no jurisdiction as a Federal court, and also because it had no jurisdiction as a court of equity, or on the merits, or because the plaintiff had not made out a case, or was not the proper party to bring the suit, and an appeal taken, and the question of jurisdiction alone certified, and this court should reverse the lower court on the only issue before it, what would it all amount to? Nothing; the decree would still stand on the other grounds. This court is not a moot court, to settle literary discussions or make *unfruitful decisions*, even between real litigants.

This court has expressly held that the jurisdiction of the court referred to in the first subdivision of the fifth section means the jurisdiction of the circuit court *as a Federal court*.

Blythe *vs.* Hinckley, 173 U. S., 501.

And our contention is, that if there were other questions decided which did not go to the jurisdiction of the court as a Federal court, and the case and decree of the court below is in that position and condition where a decree of this court would in no event change, alter, modify, or reverse the decree of the court below, then an appeal does not lie under said first subdivision, but would have to be taken under the appropriate fourth, fifth, or sixth class or subdivision, so that this court could pass on the whole case.

This is virtually the course suggested in Robinson *vs.* Caldwell, 165 U. S., 359.

And here we wish to make the suggestion that in Robinson *vs.* Caldwell and the cases leading up to it this court has made a very strained construction, but we suppose it was

the best they could do under the circumstances without creating chaos.

The fifth section of the judiciary act of March 3, 1891, gives a direct appeal or writ of error to this court in certain cases, and the sixth section gives an appeal or writ of error to the circuit courts of appeals in all cases *other* than those provided for in the fifth section; and yet this court has actually decided that an appeal or writ of error can be taken to either court, which makes them courts of co-ordinate or concurrent jurisdiction and mercilessly kills poor "*other*."

They seem to work it out this way, viz., that if a case involving a statute, treaty, or the Constitution of the United States is brought here and the court gets jurisdiction on that ground, it will then go on and decide the whole case; and this looks reasonable; but this construction would necessarily deprive the circuit courts of appeals of all jurisdiction in that class of cases, unless the construction of the law, treaty, or Constitution was waived, for it is evident that it was the intention of Congress to retain and preserve full and ample jurisdiction in this court in all such cases, and just as evident that it did not intend that primary jurisdiction should exist in both courts at the same time in the same case. If it were not for the concluding portion of the courts of appeals section 6, that in all cases not made final in those courts "there shall be of right an appeal or writ of error or right of review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs," it would appear that an appeal or writ of error would not lie to the circuit courts of appeals in any case in which a law, or treaty, or the Constitution of the United States was directly questioned or its

construction put in issue, notwithstanding other questions might also be at issue, and under such circumstances that an appeal or writ of error to the circuit court of appeals would be held to be a withdrawal or waiver of such question, if it could be waived, in the particular case. This part of said sixth section may probably refer to some other question that might arise before or after the case got to the court of appeals, or it might have been put in for safety, to provide against unforeseen contingencies or a failure of justice. It is hard to tell what it does mean. As it has a monetary limit, it would not seem to be specially constructed for constitutional questions, and from the fact of its uncertainty, it would not seem to be a correct construction to let it displace the certain and definite word "*other*."

There are cases where the latter part of this sixth section can be made effective. For instance, if the lower court should decide the Federal questions in plaintiff's favor, and then decide against him on the merits, as this court has frequently done (in 132 U. S., 174; 146 U. S., 302, &c.), the plaintiff could appeal to the circuit court of appeals; and if that court reverses and decides the merits in his favor, then the defendant should be allowed an appeal or writ of error to this court from the court of appeals on the Federal question, &c.

The circuit court of appeals for the fifth circuit evidently dismissed the appeals in this and the two preceding cases, Nos. 318 and 319 here, on the ground that if a construction of the Constitution and laws of the United States was involved and was actually in controversy and put in issue in the court below and could not be waived, then it had no jurisdiction. It is perfectly plain that the constitutional

questions, having been decided against the plaintiff, could not be waived in these cases, because a waiver would necessarily affirm the decree of the court below and render the appeal itself abortive. It seems to us that the true construction would be that where a losing party has a *bona fide* question of that kind, and either intends or is forced by the nature and status of his case to insist on it, that it limits the exclusive jurisdiction to this court, and that where other questions are also involved, and the case is in that state and condition that the Federal question can be waived and the case still go on and be disposed of on the other questions, then an election to appeal or obtain a writ of error to the circuit courts of appeals is a waiver and abandonment of any right to insist on a Federal question, as much so as if a written agreement to this effect was signed and filed with the appeal papers, just like the issuance of an injunction against an execution is a release of errors in the judgment. So an appeal or writ of error to the court of appeals should be held to be a release of all errors as to the construction of a law, treaty, or the Constitution of the United States.

This is explanatory of our understanding of the action of the circuit court of appeals. The exact point we make here is that if the appeal is taken to this court under the first or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, the jurisdiction of this court is limited to a review of the jurisdiction of the court below as a Federal court alone, and that it cannot review any other question. We think that clause was intended as a simple and easy method of settling this question expeditiously, and thus many times saving further expense and delay; but that if the court below goes on and decides other

questions fatal to the plaintiff's claim, then this court must dismiss the appeal, for the reason that on such an appeal they have no jurisdiction to decide the other questions, and as a necessary consequence no jurisdiction at all.

Now, when we examine the record for the grounds on which the decree of dismissal is founded, we find that it sustains a motion to dismiss.

When we examine the motion to dismiss, we find that it gives as the ground that the bill is a pure injunction bill, and the injunction refused and an appeal to the circuit court of appeals for the fifth circuit dismissed. Then, as no leave was ever asked or granted or refused to amend, and no amendment of the bill ever made after the refusal of the injunction, we must go back to the interlocutory order or decree refusing the injunction for the reasons on which the refusal was based, and which necessarily and ultimately caused the dismissal of the bill. Then if we examine the decree refusing the injunction, we find that it is based on two distinct and independent grounds, as follows, to wit :

1st. The court "finds that the complainant has shown no right to invoke the jurisdiction of this court."

2d. "And further, being of opinion that this court has no jurisdiction."

Record, p. 51.

The court had granted a temporary restraining order and the plaintiff made a regular motion for an injunction on his bill.

The defendants made a counter-motion to discharge this restraining order, quash the writ, and to refuse the injunction.

The plaintiff's motion contained no specific grounds, but the defendant's motion contained four grounds, viz:

"1st. On the disclaimer of the sheriffs and tax collectors hereto attached and herewith tendered, the granting of an injunction would be unnecessary and improper.

"2nd. The said revenue agent has no authority to distrain, levy on, or sell anything, but only to sue in a court of competent jurisdiction for said taxes, and an injunction against him is a suit against the State of Mississippi and forbidden by the eleventh amendment to the Constitution of the United States.

"3d. This court has no jurisdiction.

"4th. Plaintiff is not entitled to an injunction or to any relief on the facts stated in the bill."

Record, pp. 18, 19.

Now, it is clear that the points raised by the second and third grounds of this motion are the ones certified by the judge, and the ones embraced in the second finding in the order refusing the injunction, that "this court has no jurisdiction," but they do not account for the first finding in this order, the "complainant has shown no right to invoke the jurisdiction of this court," clearly based on the above first and fourth grounds of the motion, and the judge does not certify this first finding, nor attempt to qualify or deny it.

It can only be accounted for by the first and fourth grounds of the motion, because any other construction would render the second finding entirely unnecessary and superfluous, and in face of the fact that on its face it purports to be en-

tirely unconnected with and *in addition to the other*, for the order itself says, "and further being of opinion," &c.

So we claim and insist that the record shows on its face that the first and prime cause of the decree refusing the injunction, and, as a necessary consequence, of the decree dismissing the bill, was a ground or grounds not going to the jurisdiction of the court as a Federal court, but as a court of equity, and that hence this appeal should be dismissed.

As we understand the reasoning of this court in other cases, it coincides with this view.

They hold that the question of the jurisdiction of the court as a Federal court must be the controlling question—that is, as we understand it, it must be the controlling question, at least to the extent that the decision of it by this court would produce some effect, not only on the opinion, but on the *decree* of the court below.

Carey *vs.* Houston, 150 U. S., 170, 181.

Now, as shown *ante* in the statement, the certificate of the judge does not show that the questions certified were all the questions decided, and the record shows they were not. Even in his certificate he says expressly that the motion to discharge the restraining order and refuse the injunction contained, "*among others*," the ground of want of jurisdiction.

Record, p. 62.

While the record does not show affirmatively on what particular grounds the first finding was made, we can sug-

gest several why "the plaintiff has shown no right to invoke the jurisdiction of this court."

A.

After the sheriffs and tax collectors had all unanimously filed disclaimers and stated that they had not only not levied on or attempted to levy on or threatened to distrain or seize the property, but that they had never given the plaintiff any reason to believe that they would, and when this is coupled with the facts shown in the bills in the other cases, Nos. 559 and 560 in that court, Nos. 318 and 319 here, showing that in fact the litigations with these and other railroads had been going on year by year for many years, and that these tax collectors had never in a single instance ever attempted to seize, distrain, or levy on anything, and when all this stood unchallenged and undenied and undisputed, and the plaintiff permitted the motion to be heard in that state of the record and under that evidence, the application for an injunction stood against the State revenue agent alone to prevent him from bringing suit; and while this is expressly forbidden by section 720 of the Revised Statutes and by the eleventh amendment to the Constitution of the United States, we think it is not governed by them alone, but that no court of equity, State or Federal, would have or would exercise any jurisdiction to enjoin an officer or any other person, whether an officer or not and whether his claim was well or ill founded, from bringing a suit in the ordinary courts of law or equity, where every available defense could be set up and availed of.

Archer *vs.* Terre Haute, &c., 7 Am. & Eng. R. R. C., 249.

Same case, 102 Ills, 493.

B.

Res Adjudicata.

The opinions of the State supreme court, as shown by the judge's note of the evidence, were introduced in evidence, and a written agreement shows that this suit, No. 561 in the circuit court, was tried at the same time, and, together with cases No. 559 and 560, which are now pending on similar appeals here under the Nos. 318 and 319 (Record, page 20, paragraph 1), and this serves to identify the case in which the opinions of June 20 and November 22, 1898, were rendered, without introducing the whole case and making an unnecessary padding or enlargement of the record, and in cases where by statute the opinions are required to be in writing and filed the opinions themselves are the best evidence of what the court decided, although much of what the court did decide is shown in the bills in said cases Nos. 318 and 319.

Lawrence *vs.* Stearns, 79 Fed. R., 878.

Stearns *vs.* Lawrence, 83 Fed. R., 738.

The last opinion of the supreme court in said case, No. 244, was made February 20, 1899.

Record in that case, pp. 685, 688.

The decree of the judge refusing the injunction and quashing the restraining writ was made on February 7 and filed on February 8, 1899.

Record, pp. 51, 52.

And the final decree dismissing the bill was made on May 1, 1899, and shows on its face that it was made because this was an injunction bill and the injunction had been refused.

Record, p. 56.

There was no new evidence offered nor any application to amend the bill, and hence the bill was dismissed for matters submitted to the court on January 17, 1899, and passed on February 7, 1899. In the case No. 244, which, as shown *supra*, was introduced in evidence through the statements and admissions contained in the bill in Nos. 559 and 560 and the opinions of June 20 and November 22, 1898, the record of that case here shows that it was at that time pending on a second appeal to the State supreme court, which was not decided till *February 20, 1899*, and the writ of error from that case, which was No. 9251, was not sued out to this court till *March 3, 1899*.

See No. 244; Record, pp. 688, 690.

This court has very properly decided that the record of a cause embraces also any proceedings in the appellate court.

Watson *vs.* Jones, 13 Wall., 679.

What we are doing now is calling the attention of this court to the status of the litigation in said case here, No. 244, at the time this case was tried in the court below, so as to show exactly what was before the circuit court at the time the motions for and against the injunction were heard, and also at the time the bill was dismissed. The bill was not dismissed until May 1, 1899, after the writ of error in said

case No. 9251 was sued out to this court in said case No. 244 here, but that fact was in nowise brought to the attention of the circuit court, and hence is not in the record and cannot be considered as a part of this case. Besides, the first appeal, in which the decisions of June 20 and November 22, 1898, were rendered, was No. 8629 in the State supreme court, and there is no writ of error from that case, but only from the judgment on the last appeal in No. 9251.

Now, the decisions in the opinions of June 20 and November 22, 1898, which were rendered on the first appeal, in said case No. 8629, under the rulings of the supreme court of Mississippi and of this court and of all other courts proceeding according to the course of the common law, are final and conclusive and *res adjudicata* as to the taxes on this same Louisville, New Orleans and Texas railroad for the years 1892–1895, which were embraced in that consolidated suit and could not be in any manner reviewed or modified on a second appeal or writ of error in the same case.

Stewart *vs.* Stebbins, 30 Miss., 66.
Smith *vs.* Elder, 14 S. & M. (22 Miss.), 100.
Thompson *vs.* Maxwell, &c., 168 U. S., 451, 456.
McKinney *vs.* State, 117 Ind., 27, 28.
Agne *vs.* Seitsinger, 104 Iowa, 485, 486.
Long *vs.* Perine, 44 W. Va., 243, 245.

Indeed, the principle seems to be so universal that it is a waste of space and time to further particularize. Many of the authorities not referred to *supra* are collected in 2 Ency. Pldg. & Prac., pp. 373–380, and notes.

But even if it had been the first appeal instead of the second which was pending in the State supreme court, it is settled by the great weight of authority that if the effect of the writ of error or appeal in the nature of a writ of error is only to suspend execution and not to open up the case for a trial *de novo* in the appellate court that the judgment stands good till reversed, and the mere appeal or writ of error does not in any manner affect its force and effect as a judgment or as *res adjudicata*.

Kansas City, &c., R. R. Co. *vs.* Twombley, 100 U. S., 81.

Oregonian, &c., *vs.* Oregon, 27 Fed. R., 277, 284.

Cloud *vs.* Wiley, 29 Ark., 80.

Burgess *vs.* Poole, 45 Ark., 373.

Taylor *vs.* Shew, 39 Cal., 536.

N. Am. Bk. *vs.* Wheeler, 28 Conn., 441, 442.

Allen *vs.* Savannah, 9 Ga., 286.

Moore *vs.* Williams, 132 Ills., 589.

Nil *vs.* Comparet, 16 Ind., 108, 109.

Burton *vs.* Burton, 28 Ind., 342.

Randles *vs.* Randles, 67 Ind., 434.

Schieble *vs.* Slagle, 89 Ind., 328.

State *vs.* King, 94 Ind., 371.

Line *vs.* State, 131 Ind., 468, 470.

Vinsant *vs.* Vinsant, 49 Iowa, 641.

Faber *vs.* Hovey, 117 Mass., 108.

Hudemeyer *vs.* Hughes, 13 Mo., 89.

Fredericks *vs.* Clarke, 3 Mont., 258.

Creighton *vs.* Keith, 50 Neb., 810.

Same case, 70 N. W. R., 406.

Suydam *vs.* Hoyt, 25 N. J. L. (& 1 Dutcher), 230, 231.

Sage *vs.* Horpening, 49 Barb., 166.
Parkhurst *vs.* Burdell, 110 N. Y., 386.
Rogers *vs.* Hatch, 8 Nev., 35, 40.
Cain *vs.* Williams, 16 Nev., 426.
Merchants, &c., *vs.* De Wolf, 33 Pa. St., 45.
Paine *vs.* Schenectady, 11 R. I., 411.
Thompson *vs.* Kercheval, 10 Humph. (Tenn.), 322.
Furber *vs.* Carter, 2 Sneed (Tenn.), 1.
Cherry *vs.* Speight, 28 Tex., 503.
Thompson *vs.* Griffin, 69 Tex., 139.
Newcomb *vs.* Drummond, 4 Leigh (Va.), 58, 59.
Smith *vs.* Schriener, 86 Wis., 22–24.

And such is the doctrine of the common law.
Scott *vs.* Pilkinson, 110 Eng. Com. L., 11.
Same case, 2 Best. & S., 41.

And such is the effect of Mississippi judgments as understood in the cases of Cherry *vs.* Speight, 28 Tex., pp. 518, 519, and Smith *vs.* Schriener, 86 Wis., 23, *supra*, in referring to, among cases in other States—

Planters' Bank *vs.* Calvit, 3 S. & M. (11 Miss.), 143.
Kilpatrick *vs.* Dye, 4 S. & M. (12 Miss.), 289.
Montgomery *vs.* McGimpsey, 7 S. & M. (15 Miss.), 557.

The reasons are clearly given in 28 Conn., 441, 442; 117 Mass., 108; 8 Nev., 40; 16 Nev., 426, *supra*, &c., &c.
See also Hubbell *vs.* United States, 171 U. S., 209, 210.

So it is clear beyond any dispute that the decisions of June 20 and November 22, 1898, are *res adjudicata*, and can be pleaded as such to any suit in reference to the taxes on the same property for the years 1892, 1893, 1894, and 1895.

The question now is whether these decisions are *res adjudicata* to this suit, or, in other words, to a suit for taxes for years subsequent to 1895, or, in this case, the year 1898.

The bill in this case was filed and affidavit to it made on *December 16, 1898.*

Record, p. 13.

And both this court and the supreme court of Mississippi have decided that a suit for the taxes of one year is *res adjudicata* when pleaded or offered in evidence in a suit for the taxes of another year, as to the points necessarily involved and in fact decided in the former suit.

New Orleans *vs.* Citizens' Bank, 167 U. S., 389–401.

Southern Pac. R. R. Co. *vs.* United States, 168 U. S., 48–52.

Stone *vs.* Farmers' Bank, 174 U. S., 409, 412.

Smith *vs.* Kernochen, 7 How. (U. S.), 198.

Bissell *vs.* Spring Valley, &c., 124 U. S., 225.

Martin *vs.* Lofland, 10 S. & M. (18 Miss.), 317, 320.

Stewart *vs.* Stebbins, 30 Miss. (1 G.), 66.

Opinion of February 20, 1899, in said case No. 244, p. 685.

Hancock *vs.* Singer Mfg. Co., 42 Lawyer's Rep. Annotated, 852.

And generally see—

Bigelow on Estoppel, pp. 37–46.

In Martin *vs.* Lofland, 10 S. & M., 317, *supra*, property had been sold under executions, and a contest came up between two judgment creditors as to who was entitled to the proceeds, and it was decided in favor of one side. Afterwards in a different year other property was sold under other executions emanating from the same judgments, and a contest again arose over the proceeds between these same creditors. Here were different executions, different property, a different year, and different proceeds, and yet the court held that the first judgment settled conclusively their relative rights as flowing from the same judgments.

So in Stewart *vs.* Stebbins, 30 Miss., 66, *supra*, the court say:

"Whatever is necessarily determined by this court in deciding upon the propriety of the judgment of the court below, or in settling the principles to govern the case in any further proceedings necessary to be taken in it, is *res adjudicata*, and final and conclusive on the parties in that, *or any subsequent suit.*"

The italics are ours.

And in the case cited, on page 685, in No. 244 in this court, the court had decided certain questions "in settling the principles to govern the case in any further proceedings to be taken in it" in their opinion of June 20, 1898, on the first appeal in No. 8629 there, and when it was remitted to the trial court there were consolidated with it two other later cases for the taxes of two later years, 1896 and 1897, under the general former number 2788, and judgment was rendered for the plaintiff for all the years 1892, 1893, 1894, 1895, 1896, and 1897, and when it got back to the State

supreme court under its number 9251, from which a writ of error is now pending here under the said number 244, October term, 1899, the State supreme court in affirming the judgment say in reference to this question, "The former opinion of this court in this case settled definitely and conclusively all the issues involved," &c.

So not only has the supreme court of Mississippi agreed with this court that a judgment for the taxes of one year is *res adjudicata* in a suit for the taxes of a subsequent year as to the facts properly in issue *and actually decided*, but it has decided that very thing in the course of this same litigation about the taxes of 1892–1895, inclusive, and the taxes of 1896–1897, inclusive, so that the question whether it is *res adjudicata* is itself *res adjudicata* in this same litigation. It is true this opinion of February 20, 1899, had not been rendered when this case was decided on the motions in the court below on February 7, 1899, and as neither side introduced any new evidence on the motion to dismiss on May 1, 1899, it is probable that we cannot now on this appeal use it as a technical *res adjudicata*, but we can and do refer to it and the other two cases to show what the law of Mississippi is on this subject as construed and enforced by her highest court, and that it coincides with the holding of this court on the same subject.

And the question whether a decision in a State court that the suit for the taxes of a former year can be used as *res adjudicata* in a suit for the taxes of a subsequent year raises no Federal question.

Phœnix Ins. Co. *vs.* Tennessee, 161 U. S., 184–186.
Newport *vs.* Newport, 151 U. S., 527, 538.
In re Woods, 143 U. S., 202, 206.
San Francisco *vs.* Itsell, 133 U. S., 65.

This court has also decided that when the supreme court of a State has decided a point, it is equally *res adjudicata* when attempted to be again brought in controversy in the Federal courts as in the State court. The Federal courts, in accordance with the spirit of the Federal Constitution, will in ordinary cases give the same faith and credit to judgments in the State courts as are given to them by the State courts. They cannot be attacked collaterally, but must be brought up to this court through the proper medium of following along after the first suit in the State court.

Smith *vs.* Kernochen, 7 How. (U. S.), 198.
Parris *vs.* Ferris, 2 Black., 606.
French, trustee, *vs.* Hay, 22 Wall., 238.
Forsyth *vs.* Hammond, 166 U. S., 516–518.
Rosenthall *vs.* Coates, 148 U. S., 148, 149.
Chaffin *vs.* St. Louis, &c., 4 Dill., 24.
Hazard *vs.* Chicago, &c., R. R. Co., 4 Biss., 453.
Consolidated, &c., *vs.* Whitney, 2 Ban. & A., 30.
6 Federal Cases, pp. 342, 345.
5 Federal Cases, p. 408.
11 Federal Cases, p. 924.

The fact that one is a State court and the other a Federal court makes no difference. The question whether the judgment of a court of general jurisdiction, having jurisdiction of the subject-matter and the person, is *res judicata* in a subsequent suit on the matters litigated and determined in the former suit is one depending on general principles of law, and even the fact that it is decided by a Federal circuit court does not make it a Federal question or justify an appeal to

this court under any clause or class of the judiciary act of March 3, 1891.

Carey *vs.* Houston, &c., R. R. Co., 150 U. S., 179–181.
Blythe *vs.* Hinckley, 173 U. S., 507, 508.

In the last case this court say that an appeal will not lie to this court, even though the decision of the circuit court "is based solely on the binding force of the State judgment."

Ib., p. 507.

And further on they announce the doctrine that "it is not enough that the State court had concurrent jurisdiction to pass on the Federal questions thus intimated, for the Constitution, laws, and treaties of the United States are as much a part of the laws of every State as its own laws and constitution, and if the State court erred in its judgment, it is mere error and cannot be corrected through the medium of bills such as those under consideration."

Blythe *vs.* Hinckley, 173 U. S., 507, 508.

C.

The bill shows that the sheriffs and tax collectors had refused to receive the affidavits and give the receipts required by the exemplified charter sections of the original Louisville, New Orleans and Texas Railway Company and Natchez, Jackson and Columbus Railroad Company.

Pars. 13, 14, 15; Record, p. 8.

These charters say that it shall be the duty of the tax collector in each and every county in each and every year

to give the companies a receipt in full for the taxes on receiving a certain affidavit, "which receipt so given shall be in full of all taxes, State, county, and municipal."

Par. 2; Record, p. 2.

It will be noticed here that it is not the money or a tender of the affidavit which releases, **but the receipt itself.** Now, if the officer refuses to receive the affidavit and give the receipt, and his duties are merely ministerial, as claimed by the appellant, then equity has no jurisdiction, because there is a full, plain, and adequate remedy at law by mandamus. The statute provides that "on the petition of the State by its attorney general, or a district attorney, in any matter affecting the public interest, or on the petition of any private person who is interested, the writ of mandamus shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer or person to do or not to do, an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust or station, where there is not a plain, adequate and speedy remedy in the ordinary course of law."

Annotated Code of 1892, § 2846.

And it is careful to protect the plaintiff from injury *pendente lite*, for it provides that "during the pendency of the action the court or judge in vacation may make temporary orders for preventing damage or injury to the plaintiff until the case be decided."

Ib., § 2854.

So the officers could be directed to suspend any proceedings until the right to the receipt was settled.

And where there is an adequate remedy at law to prevent or correct an attempt to collect an illegal tax, this court holds that equity has no jurisdiction, and the decision of the circuit court as to that raises no jurisdiction in this court.

Smith *vs.* McKay, 161 U. S., 356–358.
Affirmed in No. 233, Black *vs.* Black, 163 U. S., 678.
No. 20, Tucker *vs.* McKay, 164 U. S., 701.
No. 256, Blythe Co. *vs.* Blythe, 172 U. S., 644.
Blythe *vs.* Hinckley, 173 U. S., 506, 507.
(3d ed.) 2 High on Inj., § 1218 and n. 2.
Archer *vs.* Terre Haute, &c., 102 Ills., 493.

D.

While the bill shows that an amount equal to the taxes for the year 1898 was paid on the construction debt of the Louisville, New Orleans and Texas Railway Company, and also on the construction debt of the Natchez, Jackson and Columbus Railroad Company, it does not show what became of the balance of the profits for the year 1898, or whether it was sufficient to pay the dividend of 8 per cent. on the capital stock or not, and does not show that the taxes had ever been paid on any construction debt previous to the year 1898. The express provisions of the charters are that it shall be so paid "*in each and every year* during the year."

Pars. 2, 13, 14; Record, pp. 2, 8.

They were not authorized to pay or apply the profits to betterments, purchase of other roads, or any other debts ex-

cept the construction debts in preference to the taxes. The State was merely a looker-on in Vienna, a passive surety, without any voice in the management, and they were required to deal fairly with it.

Mackintosh *vs.* Flint, 34 Fed. Rep., 592–616.
M. & O. R. R. Co. *vs.* Tennessee, 153 U. S., 506.
Barry *vs.* M., K. & T. R. R. Co., 27 Fed. R., 8, 9.

Being a matter peculiarly within their own knowledge, they should be required to keep accounts and make a clear showing of what was done with the profits each year.

Barry *vs.* M., K. & T. R. R. Co., 27 Fed. R., 8, 9.
St. Louis *vs.* Berry, 41 Ark., 521, 522.
Mackintosh *vs.* Flint, 34 Fed. Rep., 600.
M. & O. R. R. Co. *vs.* Tennessee, 153 U. S., 488, 489.
Raleigh *vs.* Reid, 13 Wall., 269.
1 Taylor on Evidence, § 376.
Great Western, &c., *vs.* Bacon, 30 Ills., 352, 353.

The bill in this case was filed on December 16, 1898. In the opinion of November 22, 1898, which the judge's notes show (page 49) was introduced in evidence in this case (see Record in case No. 244, pages 675, 676), the supreme court say:

"There is also much force in another view presented by counsel for the revenue agent to the effect that since 1888, the proof in the record shows that the railroad company has been able to declare and pay the annual dividend of 8 per cent. even upon its *fictitious* capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision."

This certainly needed an explanation or denial. This is not a new case or new matter, and the plaintiff ought not to be allowed to go into the Federal court and get an injunction from the very fact of being indefinite, and not only that, but, as the record shows, of being purposely and studiedly indefinite.

E.

The bill sets out that the Louisville, New Orleans and Texas Railway Company was formed by a consolidation of the Memphis and Vicksburg Railroad Company and New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company with two foreign companies, under the act of March 3, 1882, as amended by the act of March 15, 1884, and that it "speedily constructed the railroad contemplated, so that the said railroad was so far complete as that through connection between its various working gangs was made and the first train ran on or about the first of October, 1884."

Pars. 7, 8, and 9; Record, pp. 4, 5.

But it very naively neglects to tell *when* that company was formed, or *when* the railroad was commenced, or how far complete at the time it was formed, and carefully abstains from filing the articles of consolidation. Under other circumstances this might be regarded as oversight of the pleader about things not occurring to him as material; but when we notice that there is no hesitation about giving dates about other things, we become a little skeptical and suspect a motive, and when we examine the opinion of November 22, 1898 (see Record in No. 244, pages 673, 674), the motive is at once revealed. There the State supreme court

holds that this twenty-first section is prospective, and shows that the Louisville, New Orleans and Texas Railway Company did "not come into existence until after the road from Memphis to New Orleans was completed."

In paragraph 9 of the bill in this case they are good enough to tell us that the road was constructed "under the charters of the constituent companies" (Record, p. 5); but in case No. 560, which is No. 319 here, the plaintiff, or rather its sponsor in that case, The Illinois Central Railroad Company, is not so gingerly with dates. In that case, No. 319, in paragraph 8 of the bill (see Record, pp. 11, 12) in that case, it is asserted that—

"The said railroad was speedily constructed by the aforesaid constituent companies and by the consolidated company in the years 1882, 1883 and 1884, so that through connection between the working gangs of said railroads was made, and the first train ran thereon, about the first of December, 1884."

Now, the Louisville, New Orleans and Texas Railway Company having been organized under the amendatory act of March 15, 1884, could not, of course, have built any railroad before that time, and it is not shown how long after that before it was formed, nor how much of the railroad was built before or how much after it was formed, or whether any part whatever was built above Vicksburg or below Vicksburg after it was formed.

The charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, one of the constituent companies, never had any exemption at all and was authorized

to build all the way from New Orleans, via Vicksburg, to Memphis.

Laws of 1882, p. 920, § 1.

On the contrary, the Memphis and Vicksburg Railroad Company, the other constituent company, had this appropriation or exemption section, being section 21 of the charter of the Mobile and Northwestern Railroad Company, extended to it by the act of August 8, 1870.

Laws of 1870, p. 317, § 2.

For convenience see above two charters in case No. 244, pages 21 and 31, 40 *et seq.*

Now, if the Baton Rouge Company had built all that it was authorized to build, none of it would have been exempt, and there is nothing to show whether it did or did not.

See on this point R'y Co. *vs.* Blythe, 69 Miss., 943, 944.

But if the Memphis and Vicksburg Railroad Company had built *all that it was authorized to build*—that is, from Memphis to Vicksburg—and the Baton Rouge Company had built below Vicksburg, then, under ordinary circumstances and well-settled rules, the part above Vicksburg would have been exempt and the part below not exempt.

Keokuk *vs.* Missouri, 152 U. S., 305.

But, according to the allegations of the bill, all that was built before the consolidation was "built under the charters of the constituent companies," and if we reverse the rule in regard to charters and exemptions and construe these alle-

gations most strongly in favor of the pleader and most strongly in favor of the grantee and exemptionist and against the State, the most that can be said would be that the two railroad companies went in together and built the road jointly. Now, there was no authority before the consolidation to build any *joint road*, and certainly no law exempting any *joint road* from taxation.

There is a remarkable thing about this act of March 3, 1882, under which the Louisville, New Orleans and Texas Railway Company claims to have been formed, and which, therefore, would constitute its charter. It is a peculiarity we never saw in a charter before. It is the use of the word "*now*." The first section gives to the consolidated company all the immunities, &c., "**now**"—that is, on March 3, 1882—"possessed by the consolidating companies."

Laws of 1882, pp. 1011, 1012, § 1.
Record in No. 244, pp. 41, 42.

Now, in the Lambert case, being Natchez, Jackson & Columbus Railroad Company *vs.* Lambert, 70 Miss., p. 787, it is held that all exemptions were withdrawn by the Code of 1880, sections 597–608. In the suggestion of errors in said case No. 244, on the first appeal, which was filed on June 27, 1898, and was then a part of the case, it is openly admitted and asserted that all exemptions were withdrawn by the Code of 1880.

See Record in No. 244, pp. 519, 520.

So when the act of March 3, 1882, was passed giving to the consolidated company all the immunities now possessed

by the consolidating companies neither one of them had any exemption. The one never did have any, and that of the other had been and still stood withdrawn.

The plaintiff seems to recognize this, because we call particular attention to the fact that they do not claim any privilege or exemption whatever through the charter of either the Baton Rouge Company or the Memphis and Vicksburg Railroad Company, and do not even mention or claim that either one ever had any exemption.

They claim their exemption *entirely and exclusively* through the fifth section of the charter of the Louisville, New Orleans and Texas Railway Company, or act of March 3, 1882, as amended by the act of March 5, 1884.

Now, if we turn to this opinion of November 22, 1898, which was introduced in evidence, it expressly decides that this fifth section is *prospective*, and says that the Louisville, New Orleans and Texas Railway Company did not come into existence till after the road was built.

Record in No. 244, pp. 673, 674.

This is a finding of fact conclusive on this court.

Egan *vs.* Hart, 165 U. S., 188.

But, leaving all that out of consideration, it is an absolute fact that the bill does not show how much, or what part, was built after the formation of the Louisville, New Orleans and Texas Railway Company, and, if we were to concede that this fifth section was both prospective and retrospective and intended to exempt railroads already built, the plaintiff would be in no better plight, for this court has expressly decided that the exemption of a structure or railroad already

completed is a mere continuing gratuity and may be repealed, modified, or altered at pleasure without any violation of the Constitution of the United States, even though the recipients might afterwards incur expenses on the faith of it and build an inch or two, or a foot or two, or a yard or two, or a mile or two, it is not shown or claimed which.

Grand Lodge *vs.* New Orleans, 166 U. S., 143, and authorities cited.

Pearsall *vs.* Gr. N. R'y Co., 161 U. S., 666–668.

Tucker *vs.* Ferguson, 22 Wall., 527, 575.

West Wisconsin R. R. Co. *vs.* Supervisors, 93 U. S., 595.

F.

As shown under the first head, it was clearly improper to join the State revenue agent as a party to this suit, even if it had been proper to enjoin the sheriffs, and a misjoinder of parties is good reason for refusing an injunction.

(3d ed.) 2 High on Inj., § 1613, citing—

Hudson *vs.* Maddison, 12 Sim., 416.

Jones *vs.* Garcia, &c., Turn. & R., 297.

There are other non-Federal reasons for the first finding in the decree, but we will now pass on to the so-called Federal questions.

Second Finding in the Decree.

There are two findings in the decree refusing the injunction, and hence, as we have shown, two grounds on which the bill was dismissed—one that the plaintiff had shown no right to invoke the jurisdiction of the court and the other that the court had no jurisdiction.

We have now argued the first ground.

The second is divided by the judge's certificate into two grounds:

1st. That no Federal question was involved, and—

2d. That it was a suit against the State.

First Certified Ground.

That there is no Federal question involved.

It must be remembered always that this case was tried by agreement at the same time and together with the two previous cases, Nos. 559 and 560, in the court below, now here on appeal as Nos. 318 and 319, and that on the hearing of the motions in this case the decisions of the State supreme court of June 20 and November 22, 1898, were introduced in evidence, as shown by the judge's notes.

Record, pp. 20, 19.

This was all that was necessary to show what the supreme court decided in the opinions of June 20 and November 22, 1898, and then to show that those opinions were rendered for the taxes of 1892, 1893, 1894, and 1895 on the same

property in this suit, to identify the opinions with the case. We have already argued the effect of those decisions, and, as we think, shown that they are *res adjudicata* in this suit, and that hence no Federal question is involved in this suit. If any Federal question is involved, it is in that suit, which is now here on writ of error from the State court, and error, if error there be, can be corrected here in that suit, and as this court put it, "not through the medium of bills such as those now under consideration."

Blythe *vs.* Hinckley, 173 U. S., 507, 508.

Besides, we claim that as the Louisville, New Orleans and Texas Railway Company necessarily accepted its charter under the act of March 3, 1882, as amended by the act of March 15, 1884, it accepted it long after the supreme court had established the doctrine that all exemptions or appropriations of taxes were repealable under the constitution of 1869 in the year A. D. 1878, in the case of Mississippi Mills *vs.* Cook, 56 Miss. Reports, pp. 42, 43, 50, 51, 54, 55, 53, 62.

And while the charter of the Natchez, Jackson and Columbus Railroad Company was granted in 1870, yet the bill in said case No. 560, which is No. 319 here, shows that the railroad was not built till after the decision in the Mississippi Mills case and in reliance on it.

See Record in No. 319, p. —.

And hence we claim that if the question were *res nova* instead of *res adjudicata*, the holding that a *repealable* exemp-

tion was unconstitutional or had been lost by a consolidation or had been repealed raises no Federal question.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

Further, we hold that, considered as a straight appropriation of taxes from the State treasury, it is unconstitutional under sections 5, 13, 14, and 20 of article 12 of the constitution of December 1, 1869.

They are as follows:

"SEC. 5. The credit of the State shall not be pledged or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association.

"SEC. 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.

"SEC. 14. The legislature shall never authorize any county, city or town to become a stockholder in, or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto.

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Now, as to said sections 13 and 20 the supreme court of the State have shown that the principle of *stare decisis* cannot apply for two reasons:

1st. Because no charter identical with those under consideration was ever passed on until in the case of McCullock

vs. Stone, in 64 Miss., p. 393, and this Louisville, New Orleans and Texas Railway Co. *vs.* Taylor, in 68 Miss., p. 364, and both of them were fictitious cases, in which the court was misled into believing that the Mississippi Valley and Ship Island Railroad Company was one of the constituent consolidating companies forming the Louisville, New Orleans and Texas Railway Company, instead of the Baton Rouge Company, which never had any exemption, and were thus a fraud on the court and should not be allowed to be referred to as authority for any purpose.

See Opinion of Court in No. 244, p. 666.

These two cases were decided, the one at the October term, 1886, and the other at the October term, 1890, and hence could not have had any influence on the acceptance of charters, one granted in 1870 originally and the other in 1882, nor on the building of either of the roads, one being built about 1882 and the other in 1882–1884.

The next case was the famous Lambert case, 70 Miss., 779 decided at the March term, 1893, and, as shown by the State supreme court, the unconstitutionality of this section was not disputed nor contested in any of them.

See Opinion in said No. 244, pp. 659–671.

The court then recite the decisions of this court and of various State courts holding exemptions under constitutional provisions similar to said sections 13 and 20 to be unconstitutional, and state that the supreme court of Mississippi stands *absolutely alone* in its peculiar construction, and they

prefer now to overrule those unsound decisions and align themselves with this court.

See Opinions of June 20 and November 22, 1898, in Record in No. 244, pp. 514, 662, 670, 671.

Louisville & Nashville R. R. Co. *vs.* Palmes, 109 U. S., 248, 254.

St. Louis, &c., *vs.* Berry, 113 U. S., 475.

Schurz *vs.* Cook, 148 U. S., 408.

Keokuk, &c., *vs.* Missouri, 152 U. S., 303, 304, 310–312; 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231; 53 Ala., 570.

See also Trask *vs.* McGuire, 18 Wall., 391.

The case of Yazoo and Mississippi Valley Railroad Company *vs.* Thomas, 65 Miss., 553, was decided at the October term, 1888, and was decided on writ of error from this court in 132 U. S., 174, at the October term, 1889, long after the charters were granted and railroads now in controversy were built, and this court in that case especially call attention to the fact not only that the State court did not pass on the constitutionality of the exemption (p. 184), but that it was conceded (p. 188).

If, on the contrary, counsel attempt now to claim that this is not an ordinary exemption, but an irrepealable appropriation of taxes, they are confronted with said sections 5 and 14 of article 12 of said constitution of 1869, above quoted, besides several other things.

It will be noticed that in said section 14 the legislature cannot "authorize any county, city or town to lend its

credit," and this has always been held to prohibit these so-called donations.

Now, said section 5 is much stronger in this respect than section 14. It says, "The credit of the State shall not be pledged or loaned," thus embracing every possible phase of it, so that there could be no mistake or misconstruction. A loan of credit might mean indorsement of bonds, suretyship, or something of that kind, but when the State is in the same connection forbidden to pledge its credit, it is prohibited as well from an agreement to donate as from a direct agreement to pay money, for when applied to the State they are, generally speaking, interconvertible terms, as the revenues of the State necessarily come from taxation, and an agreement to pay a person one thousand dollars is but an agreement to appropriate one thousand dollars of taxes to the payment. Hence, if this twenty-first section be considered with reference to the particular railroad alone, to donate to it or for its benefit its own taxes, it is in its essence nothing but an exemption to that extent, pure and simple; but if considered with reference to some other source . . . if the legislature had promised to donate to it the taxes due by some other railroad or from some other fund or directly out of the State treasury, then it is clearly a promise and pledge of the State in aid of this particular corporation, and as such clearly obnoxious to said section 5.

Section 14 prohibits any arrangement by which a county, city, or town shall be authorized to extend aid to a railroad, except by the consent of two-thirds of the qualified voters, and yet, if the contention of counsel for plaintiff in error is allowed to prevail, the legislature could have done for a

county, city, and town what it had no power to authorize the county, city, or town itself to do. This twenty-first section not only appropriates the State taxes, but by *an irrepealable agreement* it agrees to appropriate "all taxes, State, county, and municipal," and this without any consent whatever from the counties and towns interested. It will not do to attribute such impotence to solemn constitutional enactments.

The court will remember that under section 2 of article 7 of this same Constitution it was proposed to confer for the first time universal suffrage, including a great majority of those just emancipated and unused to its exercise and without property, and these constitutional safeguards were not mere idle forms, but, under those momentous circumstances, were each intended to accomplish a definite and practical result, much more necessary in this instance than in Commonwealths of greater experience, which had found it necessary to adopt substantially the same provisions.

Second Certified Ground.

That it is a suit against the State.

The sheriffs and tax collectors have all disclaimed and the plaintiff has now brought this suit up to this court on the naked proposition that it has a right to enjoin the State revenue agent, as the representative of the State, from bringing a suit for the taxes.

In the first place, section 720 of the Revised Statutes ex-

pressly prohibits injunctions in the Federal courts against proceedings in the State courts.

But this suit, as it now stands, goes further than that, and is plainly a suit against the State and is forbidden by the eleventh amendment to the Constitution of the United States.

The fifteenth paragraph of the bill expressly states that the said Wirt Adams "threatens to sue in his capacity as State revenue agent," the object and intent "being to deny your orator's rights in the premises."

Record, p. 8.

This is directly in the teeth of the eleventh amendment.

It is said by this court that "a bill, the object of which is by injunction indirectly to compel the specific performance of the contract by forbidding all those acts and doings which constitute breaches of the contract, must necessarily be a suit against the State. In such case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the State."

In re Ayers, 123 U. S., 502–504.

And the distinction is clearly pointed out between this class of cases and those where the officer acts summarily and has mere ministerial duties to perform. In the latter case the wrong, if any there be, may in many cases be irremediable.

Ib., pp. 506–507.

But in the class under consideration the party has a plain remedy by writ of error to this court. .

Ib., pp. 494, 495.

This case is affirmed in—

Hans *vs.* Louisiana, 134 U. S., 10.

And distinguished in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And again referred to in a case where it is held that one of the tests is whether the State would be bound, as it clearly would be here.

Tindall *vs.* Wesley, 167 U. S., 219, 220, 223, 224.

The revenue agent can sue at law or in equity in any case where the State or any county or town can sue, and while he sues in his own name it is for the use of the State, counties, or towns interested.

Annotated Code of 1892, § 4194.

Laws of 1894, p. 29, § 2.

It is exactly like the case of *In re* Ayers, *supra*, where the suits were for the use of the State, counties, and towns.

We think it is plainly, in its true essence and object, a suit against the State.

The doctrine of *In re* Ayers was approved and applied in—

Fitts *vs.* McGhee, 172 U. S., 524–528.

Harkrader *vs.* Wadley, 172 U. S., 169, 170.

Hence we ask this court, first, to dismiss this appeal for want of jurisdiction, and, second, if there is any ground on which they feel authorized to take jurisdiction, that it be affirmed as a delay case, it being not only palpably a suit against the State of Mississippi, but involving no proper Federal question on the merits, but plainly intended to get the matters and suits tangled up in a sea of inextricable confusion, there being a plain, speedy, and adequate way and opportunity to test whatever rights they may have through and by a writ of error from the State supreme court following the writ of error in the former case, No. 244 here, and also by writs of error from this court to said State supreme court for the same identical taxes involved here.

R. C. Beckett,
Attorney for Appellees.

No. 320

By. of Col. Green for C

Filed Oct. 21, 1899.

FILED.
OCT 21 18
JAMES H. McKENN

Supreme Court of the United States

No. 320
October Term, 1899.

The Yazoo & Mississippi Valley Railroad Company,
Appellant
vs.
Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, Et Als.

Brief in Support of Motion to Dismiss or Affirm.

S. S. CALHOON,
MARCELLUS GREEN,
Attorneys for Appellees.

17,496

In the Supreme Court of the United States

OCTOBER TERM, 1899.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
Appellant

vs. } No. 320

WIRT ADAMS, STATE REVENUE AGENT, ET ALS.
Appellees

ON MOTION TO DISMISS OR AFFIRM.

BRIEF FOR APPELLEES, BY S. S. CALHOON AND MARCELLUS GREEN.

Statement of Case.

The Yazoo & Mississippi Valley Railroad Company, a corporation of the State of Mississippi, filed its original bill in the Circuit Court of the United States, in equity, against Wirt Adams, State Revenue Agent of the State of Mississippi, and the sheriffs of each county wherein the property of complainant was situated, averring that the Natchez, Jackson & Columbus R. R. Co. was chartered July 21, 1870, and that by act approved August 8, 1870, the twenty-first section of the charter of the Mobile & Northwestern R. R. Co. was extended to it (R. 2, 3), said twenty-first section being set out on page 2 of Record; that Natchez, Jackson & Columbus R. R. Co. accepted said charter and amendment, and relying thereon built the road, contracting a construction debt of $1,250,000 of bonds; that said twenty-first section constituted an irrepealable contract of appropriation, whereby the Legislature, in consideration of the construction of said road, did appropriate and set apart all taxes to which said company should be liable or subject for the period of thirty years, both privilege and *ad valorem*, to be applied to the payment of debts

and liabilities which said company should incur in the construction of said road, or for money borrowed to be used in constructing said road or in the payment of debts incurred, or money borrowed to pay debts incurred in constructing said road; that it was the duty of the tax collector in each county to give a receipt for such taxes upon the presentation of the prescribed affidavit. R. 3.

That Memphis & Vicksburg R. R. Co. was chartered in 1870; and by act of 1882, Acts 1882, p. 1011, as amended by act of 1884, approved March 15, 1884, Acts 1884, p. 936, a consolidation was authorized by said Memphis & Vicksburg R. R. Co. with any other company; and by section 5 of said act of 1882 the said twenty-first section was extended to said consolidated company. R. 5.

That a consolidation was effected under said act of 1884, between Memphis & Vicksburg R. R. Co., the New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., another Mississippi corporation, and a Tennessee and a Louisiana corporation, under the name of Louisville, New Orleans & Texas Railway Company; and proceeding under the charters of the constituent companies, under the act of March 3, 1882, and said amendatory act of March, 1884, it speedily constructed the railway, the first through train running October 1, 1884; that said road was constructed on the faith of said twenty-first section.

That Natchez, Jackson & Columbus R. R. Co. was authorized to sell its railroad, franchises, privileges and immunities by act of 1890, and said L. N. O. & T. Ry. Co. bought the same and paid therefor. R. 6.

That complainant was chartered in 1882, a Mississippi corporation; and on October 24th, 1892, complainant and said Louisville, New Orleans & Texas Ry. Co., pursuant to their respective charters, effected a consolidation whereby the existence of Louisville, New Orleans & Texas Ry. Co. was merged into that of Yazoo & Mississippi Valley R. R. Co., complainant, whereby complainant became vested with all of the rights of said Natchez, Jackson & Columbus R. R. Co., and of said Louisville, New Orleans & Texas Ry. Co., in respect to taxes and said contract of appropriation.

That in 1898, under the Code of 1892, the State Railroad Commission assessed for taxes said railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co. and formerly belonging to Louisville, New Orleans & Texas Ry. Co.

That under said twenty-first section complainant had the right to pay off said taxes by paying a sum of money on the construction debt of Natchez, Jackson & Columbus R. R. Co. in amount equal to the taxes for that year on said N. J. & C. R. R. Co. property, and by tendering to said several sheriffs the affidavit to that effect prescribed by said section 21, and in like manner paying the said taxes on the property formerly belonging to L. N. O. & T. Ry. Co., and that said sheriffs should execute a receipt for said taxes.

That complainant has tendered to said sheriffs said affidavits in conformity to said twenty-first section; but said sheriffs, in disregard of complainant's contract rights, refuse to receive the said affidavits, and have refused to execute the said receipts for said taxes, and insist upon payment thereof in money. That said Wirt Adams, State Revenue Agent, also, in disregard of said contract, "threatens to sue, in his capacity as State Revenue Agent, to collect the said taxes in currency"; the intent of said sheriffs and of said State Revenue Agent being to deny complainant's contract rights in the said twenty-first section and the benefit of the appropriation theretofore made of the amount of said taxes to said construction debts, and to force the payment of said taxes in money.

That complainant is a taxpayer within the statute of Mississippi, authorizing an injunction of attempts to collect taxes not authorized by law. Code 1892, sec. 483.

That said sheriffs have power to force payment of said taxes by seizure and sale of property, and that they will do so, and thereby a multiplicity of suits and seizures is threatened. That the assessment constitutes a lien, and that it casts a cloud on title. That if said taxes are paid under protest and suits brought to recover back complainant would be burdened with a multiplicity of suits, and at great cost and expense. That complainant is without effectual remedy at law, and is relievable only in equity.

That the amount of said taxes exceeds $2000. That the

said demands of defendants and their threatened action in the prosecution thereof are asserted under the Code of 1892, and the act of 1894 defining the power of State revenue agent, enacted subsequently to said acts investing Natchez, Jackson & Columbus R. R. Co. and Louisville, New Orleans & Texas Ry. Co. and complainant with their rights in the premises, "and such demands and threatened action on the part of the defendants herein are in contravention of the contract rights of your orator, and in violation of section 10, Art. I of the Constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract." R. 10.

That defendants pretend that said acts of 1870, 1882 and 1884, in so far as they confer said contract rights under said 21st section, were repealed by the acts of 1886, and, if then existent, by the Code 1892, which complainant denies, and if said acts do undertake such repeal they would violate said sec. 10, Art. I.

That defendants pretend that said contract rights were waived or lost by said consolidation of October 24, 1892, but this complainant denies, and avers that the Lambert case, 70 Miss. 779, is *res adjudicata* as to the effect of said consolidation of Oct. 24, 1892.

That defendants pretend that said contract rights under said 21st section were lost by the consolidation of October 24, 1892, under the operation of secs. 180 and 181, Const. 1890; this complainant denies, and avers that said Constitution of 1890, being adopted subsequently to the time that said contract rights became vested, could not, without violation of said sec. 10, Art. I, impair the obligation thereof.

The bill prays that said defendants be "enjoined from bringing any suits against your orator for the recovery of said taxes, or seizing your orator's property under any distress warrants or otherwise, or taking any steps or proceedings whatever for the recovery or collection of such taxes; that on final hearing the injunction be made perpetual, and that it may be decreed that by the said payment of said construction debts and the tender of said affidavits said taxes were paid, and that said assessment be satisfied."

Fiat for injunction was granted, restraining defendants "from further proceeding to collect the taxes mentioned * * * either by suit or otherwise, or proceeding against the property of said complainant by suit, seizure or distress or otherwise (R. 15)," and a writ of injunction was granted accordingly. R. 16. By consent this injunction was treated as a restraining order.

All of the sheriffs answered, stating that they had not seized, levied on, nor were they about to seize or levy on, said railroad property for taxes; that they had not given said railroad company or its agents or officials any reason to believe that they were, by threats or otherwise; and that the application for an injunction against them was unnecessary and uncalled for. R. 18, Ans. Sessions. Other answers the same. R. 20, 5.

The State Revenue Agent and said sheriffs then moved to discharge the restraining order and to quash the injunction writ, protesting against the grant of any injunction, because (1) on the disclaimers of said sheriffs the granting of an injunction would be unnecessary and improper; (2) the State revenue agent has no authority to distrain, levy on or sell anything for taxes; that he can only sue therefor in a court of competent jurisdiction, and an injunction against bringing such suit would be an injunction against the State of Mississippi, and forbidden by the 11th amendment to the Constitution of the United States; (3) this court has no jurisdiction; (4) the bill shows no right to an injunction or relief.

Complainant moved for an injunction. Evidence was introduced on the hearing of these motions. The Record in Miss. Mills v. Cook, 56 Miss. 40, was read, and by agreement, R. 20, the original bill therein only is in this Record. The rest of the Record as set forth in said 56 Miss. Report, p. 40, was agreed to be a part thereof. That bill, R. 25, alleged that in 1872 the Legislature had, "by a general law," passed in order to invite and stimulate manufacturing enterprises in the State, and to diversify and multiply its industries, declared that the State hereby agrees with any and all manufacturing companies in this State * * that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the pay-

ment of the debts and liabilities which any of said companies may have incurred in the construction of factories," etc., and following generally the terms of said 21st section as to payment of affidavit. That said mills had accepted said acts and on the faith thereof had constructed its factory. That said mills owned outlying lands not by way of investment. That in 1877 an act was passed repealing said act of 1872, as amended by the act of 1873, as to all property except the factory buildings, machinery and factory site; and that the tax collector, Cook, will accept the affidavit in payment of the taxes on the mill proper, but refuses to do so as to these outlying lands; avers that the act of 1877 impairs the obligation of complainant's contract in violation of the Federal Constitution. Prays injunction against the tax collector, Cook, to restrain the collection of the tax. There was a general demurrer to the bill which was sustained on March 12, 1878. R. 20. The Miss. Mills appealed, and the case was decided at the April term, 1878. R. 20.

The Record in Natchez, Jackson & Columbus R. R. Co. and Yazoo & Mississippi Valley R. R. Co. v. Lambert, sheriff of Adams county, R. 31, was read in evidence, and by agreement, R. 20, only the bill, exhibits, plea, R. 49, and demurrer are copied, and the printed report of the case, 70 Miss. 779, is treated as part of the Record.

This bill was filed January 9, 1893, and a demurrer was sustained to it by the chancery court, and on appeal this decree on demurrer was reversed, May, 1893, and this decree on demurrer is relied on as *res adjudicata*. The bill was filed by Natchez, Jackson & Columbus R. R. Co. joining Yazoo & Mississippi Valley R. R. Co. as complainant, seeking to enjoin the *ad valorem* taxes of 1891 and 1892, assessed in the county of Adams, against the property formerly belonging to Natchez, Jackson & Columbus R. R., upon the averment that said Natchez, Jackson & Columbus R. R. Co. was chartered by the Legislature of the State of Mississippi in 1870, and afterward had said 21st section extended to it by the act of 1870; that in 1878 said charter was amended and said 21st section was reënacted; that under the act of 1890, authorizing a sale or consolidation, a sale was made of all the "property, rights,

franchises and immunities" of Natchez, Jackson & Columbus R. R. Co. to Louisville, New Orleans and Texas Ry. Co.; that the franchise to be a corporation was not embraced in said sale, and that Natchez, Jackson and Columbus R. R. Co. continued to be a "going" corporation; that Memphis & Vicksburg R. R. Co. was chartered by the Legislature of Mississippi in 1870, and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. in 1882; and that these were consolidated with a Tennessee and a Louisiana corporation under the act of the Legislature of the State of Mississippi, approved March 3, 1882, entitled, "An Act to Authorize the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company to Effect a Consolidation," as amended by the act of 1884, erroneously stated 1882, and became Louisville, New Orleans & Texas Ry. Co.; that Yazoo & Mississippi R. R. Co. was chartered in February, 1882, by the Legislature of Mississippi; that on October 25, 1892, Louisville, New Orleans and Texas Ry. Co. was "merged into and consolidated with the Yazoo & Mississippi Valley R. R. Co., and that by said merger and consolidation" the capital stock, franchises, etc., theretofore belonging to Louisville, New Orleans & Texas Ry. Co. were merged into and became the property of Yazoo & Mississippi Valley R. R. Co., as will appear by a copy of the act of consolidation made exhibit to the bill; that said "merger and consolidation" was authorized by the charters of said respective companies; that upon this "merger and consolidation" Yazoo & Mississippi Valley R. R. Co. became entitled to the immunity from taxation under said 21st section theretofore belonging to Natchez, Jackson & Columbus R. R. Co.; that by said 21st section "all taxes, State, county and municipal, theretofore levied and assessed or thereafter to be levied and assessed upon the property of the Natchez, Jackson & Columbus R. R. Co., were by the State of Mississippi and by the provisions of said act appropriated and set apart, and were to be applied in the manner and for the purposes mentioned in said 21st section, * * * and that said appropriation and application was to continue for 30 years," etc. R. 33. "That said contract and agreement on the part of the State of Mississippi went far beyond the mere privilege of an

exemption from taxation, the State having solemnly agreed in said contract, and by the acts of the Legislature aforesaid, that if said company should construct a railroad as provided for in its charter and the amendments thereto, and should incur debts and liabilities in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of 8 per cent. upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of the incorporation, in 1870, should be appropriated by the State of Mississippi to the payment of the debts and liabilities incurred by the company in building said road." R. 37.

The affidavits of payment of taxes, made exhibits to that bill, show that Natchez, Jackson & Columbus R. R. Co. was then a "going" corporation, and that said Natchez, Jackson & Columbus R. R. Co. had paid the taxes for 1891 and 1892 by an appropriation of the amount of the taxes to *its* debts of construction, etc. R. 42, 46.

This bill was demurred to, but not on any constitutional grounds, nor because the said 21st section had been repealed. A plea was filed also of *res adjudicata;* in that, Louisville, New Orleans & Texas Ry. Co., on February 29, 1892, before consolidation with Yazoo & Mississippi Valley R. R. Co., had exhibited its bill in said court against said Lambert, sheriff, to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained and the bill dismissed, and from said decree an appeal was then pending, and that said decree was a bar. R. 50, 20.

Certified copies of the decisions of the Supreme Court of Mississippi in Wirt Adams, State Revenue Agent, v. Yazoo & Mississippi Valley R. R. Co. et al., rendered June 28, 1898, and November 22, 1898, may be used as published in Mississippi decisions, were agreed to be used in connection with briefs of counsel. R. 20.

The court *a quo*, upon the pleadings and evidence, "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction," and the motion to discharge the restraining order was sustained; that to grant an injunction was denied. R. 51.

Thereupon appellant prayed and obtained an appeal from said interlocutory decree, with *supersedeas*, to the United States Circuit Court of Appeals for the Fifth Circuit, and there assigned for errors—

1. That upon the bill and proofs the restraining order should not have been discharged.

2. That upon the bill and proofs the injunction should have been granted.

Thereafter, after a hearing of the merits, the Court of Appeals, *of its own motion*, dismissed the appeal. 93 Fed. 852.

Thereupon defendants entered a special appearance, and moved the court to dismiss the original bill because its sole object was to obtain an injunction, and this had been refused, and the appeal from this decree had been dismissed by the Court of Appeals for want of jurisdiction. This motion was sustained, the appellant's counsel being present in court and making no objection on the ground that the mandate from the Court of Appeals had not been filed, and the bill was dismissed. R. 56.

Thereupon the appellant petitioned for an appeal to this court under paragraph 1 of sec. 5 of Judiciary Act of March 3, 1891, and assigned for error—

That the court erred in dismissing the bill "for want of jurisdiction to entertain the same." R. 57.

The court below granted the appeal "solely on the question of jurisdiction, this court having refused to assume jurisdiction of the cause." R. 58.

In the recital of the averments of the bill, as a predicate for the certificate, it is erroneously recited that the Railroad Commission of Mississippi are made defendants to the bill, and that they and Wirt Adams, State Revenue Agent, inaugurated a proceeding under the Code of 1892 and act of 1894, and under sec. 180, Constitution 1890, to assess taxes against the property formerly of Natchez, Jackson & Columbus R. R. Co., but now of appellant, and also to assess taxes against the property that was formerly that of Louisville, New Orleans & Texas Ry. Co., but now of appellant, and to collect the same in currency, by seizures under distress warrants, and by suits brought thereupon by the State Revenue Agent (R. 61); that "the

bill further alleged that the proceeding by the State Revenue Agent and the said Railroad Commission complained of in said bill was an attempt to enforce against the charter rights subsequent legislation, viz.: the statutes of 1892 and 1894, and sec. 180, Constitution 1890" (R. 62); "and also the said bill alleged that the attempt of the said Railroad Commission and said revenue agent was to fasten upon said railroad a paramount lien under the subsequently enacted statutes," etc. (R. 62); that "the State Revenue Agent and the Railroad Commission and their clerk moved the court to discharge said restraining order," etc. (R. 62); that "the cause was finally dismissed on motion of said defendants, Wirt Adams, State Revenue Agent, and the said Railroad Commission and their said clerk, to which dismissal the complainant excepted." R. 62.

These recitals are not supported by the Record—

1. The Railroad Commission and their clerk were not parties to this suit.

2. Paragraph 12 of the bill avers the assessment, but does not complain of it in any way. The right asserted by the bill was that of paying the taxes assessed by the affidavit under said 21st section to the sheriffs.

Upon this erroneous recital of the parties to and of the scope of the bill, the court below certifies:

"Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

"2. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi, and in violation of the eleventh amendment to the Constitution of the United States."

That this certificate was given in conformity to the 5th section of the Act of Congress of the year 1891.

Thereupon appellees moved to dismiss or affirm this appeal. In aid thereof an affidavit of Wirt Adams, State Revenue Agent, is filed with this Record, showing that after the dismissal of said appeal by the Court of Appeals, and before

this appeal was taken, suit had been instituted in the Circuit Court of Hinds County, First Dist., State of Mississippi, a court having jurisdiction of the parties and subject matter, against appellant, to recover the identical taxes sought to be enjoined in this suit; that at the June Term, 1899, of said circuit court, final judgment was rendered against appellant therefor; and therefrom appellant appealed to the Supreme Court of the State, and that appeal is now pending. This judgment is relied on here as *res adjudicata*.

Appellants moved to dismiss or affirm, because: 1, it is an appeal in an injunction suit, and the purpose and object of said injunction bill and suit have failed, and the questions herein involved have become *res adjudicata;* and, 2, because this court has no jurisdiction of this appeal, or to affirm the decree, and that it is manifest if this court has jurisdiction the appeal is unnecessary and for delay; and, 3, because the questions on which jurisdiction depend are frivolous. This motion was duly served. (See Brief of R. C. Beckett.)

BRIEF.

I.

Jurisdiction.

This appeal is taken under the first clause of section 5 of the Judiciary Act of 1891, R. 57, "from the final decree refusing jurisdiction of this cause;" and "is granted solely upon the question of jurisdiction." R. 58. The certificate is that, 1, the "bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question;" 2, that there was no jurisdiction because the suit was against the State of Mississippi, contrary to the 11th Amendment of the Constitution of the United States, R. 62, and the only error assigned is that the court erred in dismissing the bill for want of jurisdiction. R. 57. The appeal should be dismissed, because,

1. The interlocutory decree of the circuit court refused the injunction and discharged the restraining order because "the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction," R. 51; the motion to dismiss the bill was solely because the injunction had been refused, R. 56; therefore, the decision of the court below was upon the ground of want of equity, and the word "jurisdiction," as used in the decree, means jurisdiction in its general equity sense, and not that the decision was rendered upon the jurisdiction of the circuit court as a Federal Court. The appeal being under this certificate precludes inquiry here into any question except the exercise of the powers of the circuit court conferred by the Constitution and statutes of the United States; and, as the ground of the decision below did not rest upon this question, this court is without jurisdiction.

Smith v. *McKay*, 161 U. S. 355.
Blythe v. *Hinckley*, 173 U. S. 501.
Third Street v. *Lewis*, 173 U. S. 460.
U. S. v. *Swan*, 65 Fed. 649.
World's Col. Ex. v. *U. S.*, 56 Fed. 654.

There were numerous questions of general equity jurisdiction involved: 1. Whether the complainant's remedy was not by *certiorari* to reverse, if erroneous, the judgment of the Railroad Commission imposing the taxes notwithstanding the alleged exemption. 2. Whether the judgment of said commission was not *res adjudicata* of the matters of said alleged exemption; 3, whether the benefits of said 21st section passed to Louisville, New Orleans and Texas Ry. Co., under the deed authorized by the act of 1890, and whether the Lambert case was *res adjudicata* of that proposition. 4. Whether Lambert case was not *res adjudicata* of the question that the said 21st section was not an exemption from taxation, and not a contract of appropriation as averred. 5. Whether there was any consideration for the grant of said 21st section. 6. Whether the benefits of sec. 21 were lost under the consolidation of 1892 under Const. 1890, secs. 180, 181. 7. Whether after the answers of the sheriffs denying that they had taken or intended to take any steps by seizure and sale, or in any other way to enforce the said assessment of taxes, a court of equity would enjoin the revenue agent from bringing one suit to enforce the judgment evidenced by this assessment. 8. Whether the amount of taxes for 1898 had been paid by payment of construction debts. 9. Whether, as averred, the assessment is a cloud on title. 10. Whether this suit would avoid a multiplicity of suits. 11. Whether the Lambert case was *res adjudicata* as to the effect of the deed of consolidation of 1892, etc., etc.

2. The recitals of the questions arising upon the record, and upon which the certificate is based, do not state the case made by the bill, in this; the bill proceeds upon the theory that a legal assessment of the taxes of 1898 had been made by the Railroad Commission (XII) and that appellant had the right to pay these taxes under said 21st section by payment of construction debts, and an affidavit to that effect, and the gravamen of complaint was that the several sheriffs in violation of appellant's contract rights under said 21st section, had refused to accept the affidavit and execute the receipt in payment, and were threatening to seize appellant's property to enforce pay-

ment in money; and that Wirt Adams, State Revenue Agent, threatened to sue to recover the said taxes in money, in violation of sec. 10, Art. I, of the Constitution of the United States. The recitals as the predicate for the certificate state that the Railroad Commission and Adams, State Revenue Agent, are proceeding to assess said property for the taxes of 1898, under subsequent statutes, and to enforce this assessment by distress and by suit, contrary to said sec. 10, Art. I. The case made by the bill is that of a valid assessment by the Railroad Commission, and the alleged unlawful acts by the sheriffs in refusing to accept said affidavits in payment, and the threat to distrain, and, also, a threatened suit by Wirt Adams, State Revenue Agent, to recover these taxes; the case made by the recitals is that of an unlawful assessment by the Railroad Commission, and the threat of the Railroad Commission to enforce the assessment by distress, and the threat of Adams, State Revenue Agent, to sue to recover the assessment. The Railroad Commission and their clerk, the actors of the said recitals against whom, with Adams, an injunction was sought, were not parties to the suit. Hence, the certificate of the question of jurisdiction by the circuit court is founded upon the mistaken recitals as to what the case really was, and, as stated by the Record, does not certify the questions of jurisdiction involved.

3. The certificate is fatally defective.

1. It does not certify that the court decided the case on the question of the jurisdiction of the court as a Federal Court, but only that questions of jurisdiction were in issue.

2. It does not explicitly state what the precise questions of jurisdiction for decisions are; it leaves this court to search through the Record to find, if possible, what question of jurisdiction was decided by the court below, how it arose, and what effect other questions, not in their nature jurisdictional within the meaning of said sec. 5, had upon the decision of the case.

Maynard v. *Hecht*, 151 U. S. 326–7–8.

4. This appeal is *by certificate* under paragraph 1 of sec. 5, judiciary act 1891, 26 U. S. st. 827, and that cannot embrace the constitutional questions under paragraphs 4 and 6 of said judiciary act, and this even though certified, because the statute does not contemplate that such constitutional questions should be brought here by certificate.

5. The Court of Appeals was vested with jurisdiction under sec. 6 to hear and determine all questions of equity jurisdiction proper, and this jurisdiction attaches under the act of 1891 upon appeals from interlocutory decrees granting or refusing injunctions.

Smith v. *McKay*, 161 U. S. 357–8.

6. If the jurisdiction of the court is involved, the party "must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction."

McLish v. *Roff*, 141 U. S. 661.
Maynard v. *Hecht*, 151 U. S. 324.
U. S. v. *Jahn*, 155 U. S. 109.
In re Lehigh Co., 156 U. S. 326.
Calvin v. *City of Jacksonville*, 157 U. S. 368.

7. By the appeal to the Circuit Court of Appeals from the interlocutory decree refusing the injunction, the *whole case* and every question involved in the final decree were necessarily presented for decision. In such case the interlocutory decree is essentially the final decree.

Smith v. *Walker*, 57 Mich. 456.
Toledo v. *Detroit*, 61 Mich. 9.
Englewood Con. Co. v. *Chicago R. R. Co.*, 117 Ill. 611.

The bill was dismissed here solely because the court had rendered the interlocutory decree, refusing the injunction.

In the Court of Appeals the merits of the *whole case* "on bill and proofs" were drawn in question by the assignment of error. R. 53. That court, after a full hearing, *of its own*

motion, dismissed the appeal. 93 Fed. Rep. 852. This carried the "whole case" to the Court of Appeals, *upon the law and the facts*, for review.

Maynard v. *Hecht*, 151 U. S. 326–7.
Lake Nat. Bank v. *Wolfeborough*, 78 Fed. 517.

8. By this appeal upon the "whole case" to the Court of Appeals, the appellant *made an election*, within the meaning of the statute, to invoke the jurisdiction of that court, and it cannot now resort to this certificate of jurisdiction.

McLish v. *Roff*, 141 U. S. 668.
Maynard v. *Hecht*, 151 U. S. 326.
Smith v. *Vulcan Iron Works*, 165 U. S. 518.
Kirwan v. *Murphy*, 170 U. S. 209.

9. With all deference to the Court of Appeals we respectfully submit that when appellant took the appeal from the interlocutory—really final—decree, that court had jurisdiction of the "whole case," and that its powers were full to decide the entire controversy, with the advice of this court upon questions of jurisdiction of the Federal Court as such if it deemed proper to certify them.

1. Because the Record presents questions of general equity jurisprudence, and other than those of the jurisdiction of the court as a Federal court, and of the construction and application of the Constitution of the United States for decision, the decree deciding that "the complainant has shown no right to invoke the jurisdiction of this court," R. 51, and these questions of equitable cognizance are *in limine*.

Maynard v. *Hecht*, 151 U. S. 324.
Green v. *Mills*, 69 Fed. 852.
Coler v. *Granger Co.*, 74 Fed. 16.
Crabtree v. *Madden*, 54 Fed. 426.
Rust v. *United Waterworks Co.*, 70 Fed. 129.
City of Indianapolis v. *Cen. Trust Co.*, 83 Fed. 529.

In Green v. Mills, 69 Fed., *supra*, it was held, the Chief Justice delivering the opinion, where the jurisdiction rested on a Federal question, viz., the validity of State laws chal-

lenged as violating the Federal Constitution, but conceding the jurisdiction, the question at the threshold was one of equitable cognizance, that the Court of Appeals had jurisdiction—and this whether the dismissal was on that ground or not. In such case the Court of Appeals should take jurisdiction of the "whole case."

Smith v. *Vulcan Iron Works*, 165 U. S. 518.
Kirwan v. *Murphy*, 170 U. S. 209.
Lake Nat. Bank v. *Wolfeborough*, 78 Fed. 517.

2. Because, where the validity of a State statute is to be determined by a construction of the State Constitution, and then the contract clause of the Federal Constitution might be involved, the Court of Appeals has jurisdiction.

City of Indianapolis v. *Cen. Trust Co.*, 83 Fed. 529.

1. The validity of the said 21st section, under Art. XII, secs. 13 and 20, of the Constitution of Mississippi of 1869, lies at the foundation of the case. Said section 13 ordains: "The property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals." And said section 20 ordains: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." Construing these provisions in other Constitutions, this court has held that their proper interpretation is that the taxation of corporate property is mandatory upon the Legislature, and that special exemptions cannot be granted.

Louisville v. *Palmes*, 109 U. S. 248.
St. Louis v. *Berry*, 113 U. S. 475.
Schurz v. *Cook*, 148 U. S. 408.
Keokuk v. *Missouri*, 152 U. S. 310–12.

In Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, here on writ of error, and numbered 244 on the docket of October term, 1899, of this court, and wherein, p. 638, will be found the masterly opinion of Mr. Justice Whitfield, the same construction was placed upon said provisions as is held by this court. Said opinion of Justice Whitfield construing appellant's claim of immunity from tax-

ation for the years 1892–1897, inclusive, under said 21st section, declares that it violates said secs. 13 and 20, and that it was void *ab initio*. Therefore, the question arising under the State Constitution of 1869, in force when said 21st section was enacted, must first be decided before any Federal question can arise.

2. The bill avers this essential matter: That defendants claim that said contract of exemption under said 21st section was lost and waived by the consolidation, under their charters, of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Miss. Valley R. R. Co. of October 24, 1892. This complainant denies as a fact, and avers (1) that the effect of said consolidation became *res adjudicata* by Lambert's case, 70 Miss. 779, by its interpretation of secs. 180 and 181 of the Constitution of the State of Mississippi (R. 10–11); (2) that the benefit of said 21st section was not lost by the effect of said secs. 180 and 181, Const. 1890, and that if such was the effect of said secs. 180 and 181 they would violate sec. 10, Art. I, of the Constitution of the United States. R. 11–12. Therefore, precedent to any question under the Federal Constitution arising these questions must be determined: (1) What, in fact, was done in said consolidation of October 24, 1892? If, as decided by Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, a new company was formed, then the Constitution of 1890 would subject appellant's railroad to taxation. (2) Was the Lambert case *res adjudicata* of the effect of said Constitution of 1890 upon said consolidation? Whether a decision is *res adjudicata* presents no Federal question. *San Francisco* v. *Itsell*, 133 U. S. 65; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 608. (3) What effect did the Constitution of 1890 have upon the powers of consolidation contained in the charters of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Mississippi R. R. Co.? The said decision in Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, held that under the said sec. 180 the powers of consolidation, unexecuted at the promulgation of the Constitution in November, 1890, could not thereafter be executed so as to confer the immunity from taxation contained in said

21st section, if then existent, upon the consolidated company, Yazoo & Mississippi Valley R. R. Co.

It would be necessary to interpret said sections 180 and 181 of said State Constitution in their effect upon the then existing powers of consolidation before the Federal question could possibly arise.

No Federal question could arise on this point, for it is settled that an unexecuted power of consolidation is a mere license, revocable at will at any time before its exercise, and that such revocation does not impair the obligation of the contract.

Galveston Ry. Co. v. *Texas*, 170 U. S. 226.

3. An essential averment of the bill is that the defendants claim that the said 21st section was repealed by the acts of 1886 and Code of 1892; this repeal is denied and the legislative power to repeal is denied; so, the proper construction of said sections 13 and 20, Art. XII, Const. 1869, must first be determined; for if the power to repeal existed and was exercised no Federal question could arise. In said Yazoo and Miss. Valley R. R. Co. v. Adams, State Revenue Agent, No. 244, it was held that the power to repeal existed and that it was exercised by the act of 1886, and, if said immunity was then existent, by the Code of 1892.

Therefore, the Circuit Court of Appeals had jurisdiction of the whole case.

10. If the Court of Appeals with the whole case before it deemed the question of jurisdiction a controlling one, the proceedings could have been suspended and the question of jurisdiction could have been certified here for instruction.

U. S. v. *Jahn*, 155 U. S. 109, 114.

New Orleans v. *Benjamin*, 153 U. S. 411.

11. The effect of the dismissal of the appeal by the Court of Appeals, left adjudged by the decree of the circuit court every question within the appellate jurisdiction of the Court of Appeals presented by the record. And, also, it adjudged that it did not elect to certify the question of jurisdiction to this

court. The sole remedy of appellant to avoid this result was to have removed the cause by certiorari to this court from the decree of the Court of Appeals dismissing the appeal.

Law Ow Bew v. *U. S.*, 144 U. S. 57.

This appeal on certificate of jurisdiction is in effect a collateral attack upon this adjudication of the Court of Appeals.

Dowell v. *Applegate*, 152 U. S. 327.

Franklin v. *German Bank*, 142 U. S. 93.

12. Jurisdiction was conferred by statute upon the chancery court to enjoin the collection of taxes not authorized by law, Code 1892, sec. 483; and if this statutory jurisdiction is a part of the equity jurisprudence of the Federal Court it will be enforced in the Circuit Court of the United States: *Cummings* v. *Bank* 101, U. S. 157; and this question of jurisdiction would appertain to the Court of Appeals.

13. Each tax collector having denied by answer that he was proceeding, or intended to proceed, or had threatened to proceed, to enforce the assessment, the injunction could not issue to restrain him; and the restraining order should have been discharged.

3 *Daniel Chan. Pr.* 1831 *and notes.*

1 *Beach Inj.* secs. 305-6.

14. When the bill was filed the State Revenue Agent was the only defendant who was threatening to enforce the assessment; and the only remedy allowed to him by law was to sue in the proper court to recover "past due and unpaid taxes" (sec. 2, Acts 1894, p. 29). To this suit each of said tax collectors was a necessary party defendant, for if the failure to collect the taxes was wilful the compensation of the revenue agent must be paid by them, Code 1892, sec. 4200.

15. Where the remedy at law is adequate, and a single action can be brought to recover back the entire claim, equity has no jurisdiction.

Shelton v. *Platt*, 139 U. S. 595.

The several sheriffs by answer having denied that they were enforcing or intended to enforce the assessment by distress,

the suit by the State Revenue Agent would be the only suit threatened, and in this suit, if brought, every available defense could be made. "It is enough for the present purpose that the State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on the Federal questions thus intimated; for the Constitution, laws and treaties of the United States are as much a part of the laws of every other State as its own local laws and Constitution, and if the State courts erred in judgment, it was mere error, and not to be corrected through the medium of bills such as those under consideration." *Blythe* v. *Hinckley*, 173 U. S. 508.

If the suit by the State Revenue Agent had been brought, equity would not enjoin because, as averred in the bill, there is a complete defense.

Hapgood v. *Hewitt*, 119 U. S. 226.

In *Shelton* v. *Platt supra*, it is held that while an unconstitutional tax may confer no right, impose no duty and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist; and citing this from Cooley on Taxation: "When a tax is imposed as a personal charge against the party taxed or against his personal property it is difficult to suggest any ground of equitable jurisdiction." Id. 595.

The tax assessed against appellant was a personal liability. Sec. 3747, Code 1892, provides that "every lawful tax imposed * * * is a debt due by the person or corporation upon which the tax is imposed * * and may be recovered by action."

It was to be recovered in a single action by the State Revenue Agent. Act 1894, sec. 2, p. 29.

Yazoo & Miss. Valley R. R. Co. v. *Wirt Adams, State Revenue Agent*, No. 244.

16. The Railroad Commission, as State railroad assessors, in making the assessment had jurisdiction of the subject matter and of the appellant, and acted judicially.

Yazoo & Miss. Valley R. R. Co. v. *Adams*, 73 Miss. 648.

Supreme Court decided March 27, 1899, Mississippi Decisions 155, and it was held in the last opinion, that the provisions of the Code of 1892, and of the act of 1894 entitled "an act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal sections 4187, 4190, 4192, 4193 and 4195 in Chapter 126 of the Annotated Code of Mississippi, Acts 1894, p. 29, in regard to the assessment of railroads for taxation, were constitutional, and that the proceedings of the Railroad Commission thereunder were judicial proceedings, and that the finding of the Commission that the property was "liable to taxation," was conclusive upon the question of immunity from taxation, and that its judgment could not be enjoined except for fraud. Citing *Adams Ex. Co.* v. *Ohio*, 165 U. S. 229; *Railway Co.* v. *Backus*, 133 Ind. 541; *Louisville Water Co.* v. *Clark*, 94 Ky. 47; *Stanley* v. *Supervisors*, 121 U. S. 550; *Williams* v. *Supervisors*, 122 U. S. 154; *Winona* v. *Minn.*, 159 U. S. 534; *Fallbrook* v. *Bradley*, 164 U. S. 167; *Throop Pub. Officers* § 541; 2 *Desty Tax.* 625 and note (2); *Burroughs Tax.* § 102; *Palmer* v. *Mahon*, 135 U. S. 665; *Railway* v. *Backus*, 154 U. S. 427.

This construction of the scope of the judicial proceedings furnished by these statutes by the Supreme Court of the State will be followed by this court.

Forsyth v. *Hammond*, 166 U. S. 516–18–19–20.
Backus v. *Fort Street Depot Co.*, 169 U. S. 559.
Covington v. *Kentucky*, 173 U. S. 231.
Henderson Bridge Co. v. *Henderson*, 173 U. S. 602.

17. With full opportunity for defense before the Railroad Commission, the appellant, after adverse decision, abandoned the forum organized to decide exclusively what property is "liable to taxation," and by this bill seeks to resort to an injunction in the Federal Court. This cannot be done.

Albuquerque v. *Perea*, 147 U. S. 582.
Walston v. *Nevin*, 128 U. S. 582.
Forsyth v. *Hammond*, 166 U. S. 519–20.
Blythe v. *Hinckley*, 173 U. S. 508.

18. Whether the Lambert case, 70 Miss. 779, was *res adjudi-*

cata, as averred, was a question of general equity jurisprudence and involved no Federal question.

San Francisco v. *Itsell*, 133 U. S. 65.
Henderson Bridge Co. v. *Henderson*, 173 U. S. 608.

Constitutionality of 21st Section.

If said 21st section was void *ab initio* because in violation of the State Constitution; or, if its benefits were lost to appellant subsequently under the Constitution of 1890, then, under the declaration of the decree that complainant has shown no right to invoke the jurisdiction of the court, the question of jurisdiction certified cannot arise. As a predicate of invoking the jurisdiction there must exist a contract the obligation of which has been impaired.

Section 21 violates the Constitution of 1869.

1. Art. XII, sec. 13, Const. 1869, ordains: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals;" and sec. 20 ordains: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Under these provisions the Supreme Court of the State held in Yazoo and Miss. Valley R. R. Co. v. Wirt Adams, State Revenue Agent No. 244, that this 21st section was unconstitutional and void. This ruling is in accord with *Louisville v. Palmes*, 109 U. S. 248; *St. Louis* v. *Berry*, 113 U. S. 475; *Schurz* v. *Cooke*, 148 U. S. 408; *Keokuk* v. *Missouri*, 152 U. S. 310-12.

No matter what the former opinions of the Supreme Court of Mississippi may have been, as this latest decision of that court is in harmony with the decisions of this court, and as this appeal comes directly from the Federal Court, this court will follow its own decisions in the interpretation of the provisions of the State Constitution.

Citizens Savings Bank v. *Owensboro*, 173 U. S. 643.
U. S. v. *Morrison*, 4 Pet. 124.
Green v. *Neal*, 6 Pet. 129.
Leffingwell v. *Warren*, 2 Black 509.

2. Was the benefit of said 21st section, if existent, lost to appellant by the consolidation in October 24, 1892, under the Constitution of 1890?

1. The charter of Natchez, Jackson & Columbus R. R. Co. was granted in 1870, and, by a subsequent act, in 1870, the said 21st section was extended to it. In 1878 the said 21st section was again extended to Natchez, Jackson & Columbus R. R. Co. Without reference to repealing statutes, and following the bill, the benefits of said section were sold by Natchez, Jackson & Columbus R. R. Co., under the act of 1890, to Louisville, New Orleans & Texas Ry. Co. with its railroad property.

The Louisville, New Orleans & Texas Ry. Co. was formed by consolidation, under the act of 1882, as amended by the act of 1884, and was composed of Vicksburg & Memphis R. R. Co., a Mississippi corporation, chartered in 1870, and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., a Mississippi corporation, chartered in 1882, with a Tennessee and a Louisiana corporation. By said acts of 1882 and 1884 the said consolidated company was granted the said 21st section for the railroad of said consolidated company.

The railroad of Natchez, Jackson & Columbus R. R. Co. so purchased ran from Jackson to Natchez; the railroad of Louisville, New Orleans & Texas Ry. Co. ran from Memphis to New Orleans.

The bill avers that on October 24, 1892, Louisville, New Orleans & Texas Ry. Co. consolidated with and was merged into Yazoo & Mississippi Valley R. R. Co., under the powers of consolidation contained in their respective charters.

In 1890 a new constitution was promulgated, and by sec. 112 it was ordained: "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the Legislature may provide for a special mode of valuation and assessment of railroads, and other corporate property, or for particular species of property belong-

ing to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value." And by secs. 181, 182 and 180, Art. VII:

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals; but the Legislature may provide for the taxation of banks and banking capital by taxing shares according to the value thereof (augmented by the accumulations, surplus and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by general laws, unless sooner repealed by the Legislature."

"Sec. 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the Legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility, extending for a period of not exceeding five years, the time of such exemption to commence from the date of charter, if to a corporation."

"Sec. 180. All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution, shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this Constitution, shall thereafter have no validity."

The powers of consolidation under their respective charters of Louisville, New Orleans & Texas Ry. Co. and Yazoo & Mississippi Valley R. R. Co. were unexercised in 1890 at the date of this Constitution. That Constitution required railroad property to be taxed in every instance where the company should be formed after it took effect. This unexercised power was a mere license, and there had been no organization thereunder at the date of the adoption of that Constitution. Con-

struing the charter powers of consolidation and what was done under them in this consolidation of October 24, 1892, the Supreme Court of Mississippi, in said decision in Yazoo & Mississippi Valley R. R. Co. v. Wirt Adams, State Revenue Agent, No. 244, upon a full review of all the Federal and State jurisprudence on the subject, held that by said consolidation, under said sec. 180, Const. 1890, the said exemption was lost. We refer the court to the exhaustive opinion of Mr. Justice Whitfield in that case for a demonstration of this proposition.

2. But it is averred in the bill that the Lambert case, 70 Miss. 779, is *res adjudicata* of the proposition that said consolidation did not have the effect to waive said 21st section. To meet this averment the Record in the Lambert case was read in evidence, R. 31, 20, 70 Miss. 779, from which it appears that the decree of *res adjudicata* relied on is one of reversal on an appeal sustaining a demurrer to the bill. The bill in that case asserts no right under the Constitution of 1869 or of 1890, and the demurrer does not challenge the bill on the ground of the unconstitutionality of said 21st section, nor of the waiver thereof by said consolidation under sec. 180, Const. 1890. R. 50–1. In said decision in No. 244, supra, the Supreme Court finds as a fact and holds:

1. That the Lambert case held said 21st section to be an exemption from taxation, and not a "contract of appropriation."

2. That the constitutionality of said 21st section under the Constitution of 1869 was not decided.

3. That sec. 180, Const. 1890, in its effect upon said consolidation of October 24, 1892, was not drawn in question.

4. That said Lambert case was *res adjudicata* only for the taxes of 1891 and 1892 on that part of the railroad formerly belonging to Natchez, Jackson and Columbus R. R. Co., situate within Adams county, and upon no other part thereof and for no other year.

The allegation of the bill that said 21st section was more

than an exemption and was a "contract of appropriation" and as such was protected by the Federal Constitution is not *res nova*. The bill in *Miss. Mills* v. *Cook*, 56 Miss 40, R. 25–6, and in Lambert's case, R. 37, averred this 21st section to be a contract of appropriation, but the court in *Miss. Mills* v. *Cook* treats it as an exemption, and in Lambert's case, where the effect of the demurrer was to challenge that construction of sec. 21, the court expressly decides that it was an exemption, a mere grace, repealable at the will of the Legislature.

Exemption—Repeal.

If the said 21st section was repealable, and was repealed, then there was no contract the obligation of which could be impaired, and therefore the question of jurisdiction of the court as a Federal Court would not arise.

Did any contract of immunity from taxation exist within the meaning of the Federal Constitution? And if so, was it repealed prior to 1898?

The bill is predicated upon the existence in 1898 of an exemption from taxation: first, as to the property formerly belonging to Natchez, Jackson & Columbus R. R. Co., under said 21st section; second, as to the property formerly belonging to Louisville, New Orleans & Texas Ry. Co., through sec. 5 of the acts of 1882 and 1884, extending said 21st section to Louisville, New Orleans & Texas Ry. Co.

1. First as to exemption claimed through Natchez, Jackson & Columbus R. R. Co.

This railroad was chartered July 21, 1870, Acts 1870, pp. 221–233, and its original charter contained no exemption. Sec. 26 of its charter provided: "And the rights, power and authority granted in and by this act of incorporation shall be perpetual, except that the same may be altered or amended as necessity may require." Therefore its provisions were subject to the power of repeal.

This charter of Natchez, Jackson & Columbus R. R. Co. was granted subject to the provisions of Art. XII, secs. 13 and 20, of the Constitution of 1869—viz.: "The property of

all corporations for pecuniary profits shall be subject to taxation the same as that of individuals." "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Said 21st section was extended to Natchez, Jackson & Columbus R. R. Co. by an amendment to its charter approved August 8, 1870.

By the Code of 1871, sec. 1662, it was declared: "The following property, and no other, shall be exempt from taxation, towit:" specifying, but not including railroads.

There was no special mention made of railroads in the revenue chapter 22, Code 1871, as subject or not to taxation; but it provided that "all incorporated banks or other companies liable to taxation on their capital stock shall be assessed," etc. Sec. 1668.

By sec. 1747, chap. 22, Code 1871, a privilege tax was imposed upon express, telegraph and insurance companies, but none upon railroads.

In 1875, Acts 1875, p. 66, "An act to regulate railroad taxation" was passed, whereby it was provided: "That every railroad company, whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax as follows, * * * and the said privilege tax shall be in full of all other taxes, State, county and municipal, due from such company, or for which such company or its property could, but for the passage of this act, be made in any manner liable; * * * Provided, That lands owned by railroad companies, and not acquired and used in operating railroads, shall be taxable as other property."

This act was construed in Lambert's case to repeal the exemption of the Natchez, Jackson & Columbus R. R. Co. 70 Miss. 787. This was a *general* taxing statute.

In 1878 an act was passed, Acts 1878, page 233, approved March 5, 1878, in regard to the exemption of Natchez, Jack-

son & Columbus R. R. Co., reciting that 30 miles of the road had been built, and that the said act of 1870, extending said 21st section to Natchez, Jackson & Columbus R. R. Co., was not approved until after the adjournment of the Legislature, and that it was not passed upon an aye and nay vote; and it then again extends said 21st section to said Natchez, Jackson & Columbus R. R. Co. as to future and past taxes. This was a *special* act.

By a general act of 1878, approved the same day as the last named special act, Acts 1878, p. 87, the said general act of 1875 was amended so as to provide: "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax of $80 per mile, upon each of said roads and branch thereof, in this State, except that upon narrow gauge roads the privilege tax shall be but $40 per mile, and the said privilege tax shall be in full of all State, municipal and county taxes; fifty *per cent.* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties: *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad. Sec. 2. That this act take effect and be in force from and after its passage."

By this act it is clear that railroad property was selected for taxation and subjected to taxation. On the day of the approval of the foregoing general act, as stated, under guise of a defective enactment, a special act was approved whereby said sec. 21 was "made to apply to Natchez, Jackson & Columbus R. R. Co., etc." * * * "And that all taxes, State, county and municipal, which have heretofore * * * been assessed against said company, or assessed or levied on its property, be and the same are hereby appropriated and set apart, and shall be applied" as provided in sec. 21, Acts 1878, p. 233.

The bill in Mills v. Cook, 56 Miss. 45, was filed January 4, 1878, and on March 12, 1878, R. 20, the chancery court dis-

missed the bill, and thereby held that the Legislature had the power to repeal the exemption. In April, 1878, the Supreme Court held in that case that while the Legislature had power to exempt a *general* class, still that all classes of property selected for taxation must be taxed alike. So, concurrently with the re-enactment of sec. 21, in 1878, there was a tax imposed by *general act* on railroad property, and a judicial interpretation rendered, that all property of corporations and individuals selected for taxation must be taxed alike. Hence, the act of 1878 re-enacting sec. 21 was unconstitutional and void under Mills v. Cook. There was, therefore, no exemption in effect in 1880.

Code 1880, chap. 10, sec. 597, provided that "each railroad company owning and operating a railroad in this State shall * * in each year, file with the auditor * * a complete schedule of all its property, real or personal," specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Sec. 599 provides that the governor, auditor and secretary of state "shall * * assess the value of each railroad for the purposes of taxation," etc. "Sec. 604. The taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Sec. 605. The collector of taxes for any county shall collect the amount due the county, as is now provided by law in the case of delinquents." "Sec. 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property belonging to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

"Sec. 607. Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of

this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; * * *provided* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY."

"Sec. 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State treasurer * * in each and every year a privilege tax as follows, to-wit: Specifying the several roads, and the amount of privilege tax, and among those specified is "Natchez, Jackson and Columbus Railroad Company, thirty dollars per mile;" * * Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished."

Sec. 468, Code 1880, of chapter 10, on public revenue, of which sections 597–608 are a part, provides: "The following property, and no other, shall be exempt from taxation, towit," specifying—but these do not include railroads; and the only exemption granted railroads is to those under process of construction under secs 608, Code 1880.

The Code 1880 changes the act of 1878 supra, in that there the privilege tax was imposed primarily as a commutation tax; by the Code *ad valorem* taxes were primarily imposed; and to those companies that would accept, *in writing*, the provisions of chapter 10, the right was given of paying a privilege tax in lieu of State and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*.

Code 1880, sec. 3, provides: * * "All acts and parts of acts, the subjects of which are revised, consolidated and reenacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating

thereto, which may be contained in this Code." And sec. 8: "No private act, or act of local application, not revised or brought into this Code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re-enacted" by the Code, and "each railroad" is required to pay *ad valorem* taxes, except that if it will accept the provisions of the act, in writing—that is, thereby indicating their election to pay privilege instead of *ad valorem* taxes, they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case (the author of the Code of 1880 delivering the opinion) and in Y. & M. V. R. R. Co., v. Adams No. 244, the Code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The general act of 1884 (p. 29) entitled, "an act to amend sections 607 and 608 of Code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that section 607 of the Code of 1880 be so amended as to read as follows," copying the exact language of section 607, and then adding these words: "Any exemptions in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries: *provided, further*, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886."

Section 2 reads exactly as section 608 of Code of 1880, except that the privilege tax is increased in amount and the specifications as to the N., J. & C. R. R. Co. is as follows: "The Natchez, Jackson and Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to section 608 these words: "All the railroads not named herein and not exempt from taxation by their charter, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in

process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the Code of 1880. In said No. 244, it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted, and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant (*Y. & M. V. R. R. Co.* v. *Thomas*, 65 Miss. 553, S. C. 132, U. S. 174; *State* v. *Simmons*, 70 Miss. 485), this statute cannot be said to create an exemption.

Applying this amendment to the Code sections it amends, we find that it does not purport to amend secs. 597–606 of Code imposing *ad valorem* taxes, but is confined to the amount of privilege tax the several roads are to pay. In that light the statutes would read that Natchez, Jackson & Columbus R. R. Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the State Treasurer, * * * in each and every year, a privilege tax, as follows: * * * The Natchez, Jackson & Columbus R. R. Co., "forty dollars per mile after expiration of exemption as provided for in its charter and acts amendatory thereof."

This would mean, strictly construed, that after the time—namely, thirty years from 1870—named in its amended charter, the N. J. & C. R. R. Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of secs. 597–606 are for every year *in presenti*, and not thirty years *in futuro*.

As there is no provision in the act of 1884 for a privilege tax on N. J. & C. R. R. Co. in lieu of *ad valorem* taxes of current years, but only for such privilege tax after thirty years from 1870, and as the act of 1884 only amends secs. 607 and

608 of Code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N. J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words "after expiration of exemption as provided in its charter and acts amendatory thereof" should be construed as meaning that the Legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when in fact no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicated the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, secs. 372–3–4.

There is no repealing clause to this act. It provides for amending secs. 707 and 708 of the Code so as to read as there provided. The necessary result of not providing, by the act of 1884, for a present privilege tax as commutation for present *ad valorem* taxes imposed by secs. 597–606, would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem* taxes imposed by secs. 597–606, *in futuro*, would be no modification of the statute imposing taxes *in presenti*.

When the Code of 1880 and the act of 1884 provided for *general* taxation of railroads under Constitution 1869, Art. XII, sec. 13 (as interpreted in Mills v. Cook), all railroad property must be taxed, and the attempted restoration of *special exemption* to N. J. & C. R. R. Co. by the act of 1884 would have been unconstitutional.

But if the act of 1884 re-enacted the exemption by providing that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Sec. 3 provides: * * * "and hereafter all the railroads in this State shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in sec. 589 of the Code of 1880;" and by sec. 6 it is provided:

"That the act entitled 'An Act to Amend secs. 607 and 608 of the Code of 1880, in Relation to Privilege Taxes on Railroads, Approved March 3, 1884,' be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums 25 per centum greater respectively than the sums mentioned in said act; and hereafter said railroad companies shall pay privilege taxes respectively 25 per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co. was mentioned in said act; a privilege tax is imposed *in presenti* of 25 per cent. more than the sums mentioned in said act; "and *hereafter said* railroad companies," i. e., those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes," etc. Not thirty years hence, but "hereafter," i. e., after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the Supreme Court of Mississippi correctly held in said No. 244 that this act of 1886 repealed any exemption created before that time.

In 1890 a general taxing act was passed, entitled, "An Act to Amend the Revenue Laws," Acts 1890, p. 6, which, after prescribing general privilege taxes, by sec. 5, provides: "That sec. 1 of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last proviso thereof, and that the same be re-enacted as amended. That sec. 2 of said act of March 12, 1884, be amended by striking out all after the word "towit," in line 9, and inserting the following:

The Alabama Great Southern, per mile.	$150 00
* * * * * * * * *	
The Natchez, Jackson & Columbus, per mile. . .	50 00
* * * * * * * * *	
The Yazoo & Mississippi Valley, per mile. . . .	100 00
* * * * * * * * *	
The Mobile and Northwestern, per mile.	150 00
And all other roads constructed and to be constructed, per mile.	100 00

Provided no railroad shall be subjected to taxation while

exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed," etc.

In Lambert's case it was held that this act recognized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under secs. 13 and 20, article 12, Constitution 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of sec. 13, article 12, declaring that all property shall be subject to taxation, and of sec. 20, that taxation shall be equal and uniform. Under the rule of *Mills* v. *Cook*, 56 Miss. 40; *Lambert's Case*, 70 Miss. 779; *Worrell* v. *Vicksburg Bank*, 67 Miss. 47, and of *Adams* v. *Miss. Bank*, 75 Miss. 701, this proviso would be unconstitutional if it created anew an exemption.

The true construction of said secs. 13 and 20, article 12, Constitution 1869, is that adopted by the court in said No. 244, following the decisions of this court, in *Louisville* v. *Palmes*, 109 U. S. 248; *St. Louis* v. *Berry*, 113 U. S. 475; *Schurz* v. *Cook*, 148 U. S. 408; *Keokuk* v. *Missouri*, 152 U. S. 310–12, whereby it is declared that these provisions are mandatory upon the Legislature and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* v. *V. S. & P. R. R. Co.*, 116 U. S. 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. It follows, therefore, that when the Constitution of 1890 was framed there

was no existent exemption from taxation in Natchez, Jackson & Columbus R. R. Co., or in Louisville, New Orleans & Texas Ry. Co. as the grantee of its property, franchises and immunities.

Exemption of L. N. O. & T. Ry. Co.

2. Let us now trace the exemption claimed under sec. 5 of the acts of 1882 and 1884 as applied to the consolidated corporation, Louisville, New Orleans & Texas Ry. Co.

The constituent companies of the Louisville, New Orleans & Texas Ry. Co. were New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., whose charter was granted in 1882, and which contained, as granted, no exemption, and Memphis & Vicksburg R. R. Co., granted in 1870, and to which said 21st section was extended by the said act of August 8, 1870.

By said act of 1875, p. 66, and said act of 1878, p. 87, and by the Code of 1880, sections 597–606, it is indisputable that this exemption was repealed. The Memphis & Vicksburg R. R. Co. is not named in section 608, Code 1880, fixing a privilege tax in lieu of *ad valorem* taxes. There had at that time been nothing done under said Memphis & Vicksburg R. R. Co.'s charter.

By the Code of 1880, as shown, all railroad property was subject to *ad valorem* taxes. Railroad property was then selected for taxation, and under *Miss. Mills* v. *Cook*, *supra*, *Vicksburg Bank* v. *Worrell*, *supra*, Lambert's case, *supra*, whenever this was done sections 13 and 20, Art. XII, Constitution 1869, required all to be taxed alike.

General taxation of railroad property was the rule established by the Code of 1880.

In 1882, said section 5 was enacted, and by the said act of 1884 it was extended to the consolidated company *to be formed* by Memphis & Vicksburg R. R. Co. and the other consolidating companies. By this said *special exemption* was granted by *special act* to a *special* corporation, when by the Code of 1880 railroad property had been selected for taxation and so continued, as evidenced by the act of 1884 amending the Code of

1880 in this regard. Therefore, this *special* grant of an *irrepealable exemption* would be condemned as unconstitutional by Miss. Mills and Vicksburg Bank v. Worrell cases. The grant of the exemption was void *ab initio.*

Said general taxing act of 1884, approved March 12, amended said section 607, Code 1880, by adding these words: "Provided further, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the 1st day of February, 1886;" and amended by sec. 2, sec. 606, Code 1880, to read: "Each railroad whose line is in whole or in part in this State, shall, if it accepts the provisions of this act, pay to the State Treasurer, on the warrant of the Auditor, on or before the 15th day of December in each and every year, a privilege tax as follows: The Mobile & Ohio Railroad Company and branches, one hundred dollars per mile; the Chicago, St. Louis & New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis & Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile & Texas Railroad Company, or Louisville & Nashville Railroad Company, one hundred dollars per mile; the Mississippi & Tennessee Railroad Company, one hundred dollars per mile; the Alabama Central Railroad Company, one hundred dollars per mile; the Alabama Great Southern Railroad Company, one hundred dollars per mile; the Vicksburg & Meridian Railroad Company, eighty dollars per mile; the West Feliciana Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company, thirty dollars per mile; the Mississippi Valley & Ship Island Railroad Company, forty dollars per mile; the Ship Island, Ripley & Kentucky Railroad Company, twenty-five dollars per mile; the Mobile & Northwestern Railroad Company, twenty dollars per mile; the Greenville, Columbus & Birmingham Railroad Company, forty dollars per mile; the Natchez, Jackson & Columbus Railroad Company, forty dollars per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All railroads not named herein, and not exempt

from taxation by their charters, sixty dollars per mile; provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of the road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempted from taxation by its charter."

It is clear that the proviso to sec. 1, *supra*, exempting *lands* of Memphis & Vicksburg R. R. Co. until February, 1886, was unconstitutional, because all other lands were taxed. Memphis & Vicksburg R. R. Co., and New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. are not specifically mentioned in this sec. 2, and therefore, they, with their consolidation, Louisville, New Orleans & Texas Ry. Co., would come under the general clause of "all the railroads not named herein and not exempt by their charters, $60 per mile;" and that its exemption or not must be controlled by the application of the proviso to sec. 2 of said act.

The attempted grant of the exemption in 1882 and 1884 to the consolidated company, Louisville, New Orleans & Texas Ry. Co., was, as we have seen, unconstitutional and void, and hence, the privilege tax of $60 per mile in lieu of *ad valorem* taxes was imposed.

The said sec. 5 applied only to the consolidated company, and conferred no exemption upon the several constituent companies. This act imposing the taxes was approved March 12, 1884. The act authorizing consolidation was approved three days later, March 15, 1884. Interpreting the language *strictissimi juris*, it is clear that on March 12, 1884, Louisville, New Orleans & Texas Ry. Co., the consolidated road, was not within the exception of railroads "exempt from taxation by their charters," nor within that of the proviso, "where the same is *now* exempt from taxation by its charter." On March 12, 1884, there was no corporation in existence answering these terms. Three days later one was authorized to be created, and this power was exercised August 12, 1884. Therefore, it cannot be said, as was done in Lambert's case, with reference to this act of 1884 in reference to Natchez, Jackson & Columbus R. R. Co., that this act of 1884 "re-enacted the exemption."

If this general revenue act of 1884 did not preserve the exemption, then by it the tax would be expressly imposed. In this view the act of 1884, authorizing consolidation "with the rights, privileges and immunities in said act (1882) mentioned," would not be construed to create an exemption under sec. 5.

Covington v. *Kentucky*, 173 U. S. 231.

But if said section 5, with its *irrepealable* exemption, did operate to vest such exemption in Louisville, New Orleans & Texas Ry. Co. upon its creation, August 12, 1884, by said Code of 1880 and said general tax act of 1884, the Legislature selected railroads for taxation, and all railroads must then be taxed.

To create an irrepealable exemption as section 5 (21) attempts to do, would plainly violate said provisions of the Constitution of 1869.

The *general taxing act* of 1886, acts 1886, p. 23, amending the Code of 1880, distinctly imposes privilege taxes in lieu of *ad valorem* upon the railroads "mentioned and referred to" in said act of 1884. It is clear, as shown in reference to the N., J. & C. R. R. Co., and as held by the Supreme Court in said No. 244, that this act repealed the exemption, if then existent.

By the act of 1890, hereinbefore set forth, Louisville, New Orleans & Texas Ry. Co. was embraced in the general language: "And all other railroads constructed, or to be constructed, per mile, $100; provided no railroad shall be subjected to taxation while exempt by its charter," etc. This, as shown, *supra*, would not create an exemption; if it did it would be unconstitutional for the reasons heretofore set forth.

If there was any doubt under the Constitution of 1869, the Constitution of 1890 made it certain that all railroads should be taxed, and that, then, legally existing exemptions were repealable by the Legislature. Sections 112, 181, 182, Const. 1890. In *Adams* v. *Miss. State Bank*, 75 Miss., this Constitution was construed, and it was held that whenever a class of property was selected, all of that class must be taxed alike. The decisions of this court, followed by the State Supreme Court, in *Yazoo & Miss. Valley R. R. Co.* v. *Adams, State Revenue*

Agent, No. 244, held that taxation of all corporate property was mandatory.

In Lambert's case this clause of section 181, "Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the Legislature," was disposed of by this language: "Sec. 181 of the Constitution has no effect as to the exemption claimed. It left the matter as if the Constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law." P. 790.

The subject of the exemption of these companies from taxation had become parts of general laws on the subject of revenue prior to 1892.

In 1892 a new Code was enacted, providing by sec. 3875 that "each railroad company owning and operating a railroad, shall, on or before the first Monday of April each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles * * its entire roadbed, switches * * and showing how many miles or fractions thereof lie in this State, and in each county in this State, and in each city * * and the value of the whole and each part thereof, as subdivided herein; the total amount of the capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of the receipts of the year preceding, etc., etc. * * and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." By sec. 3876, in case of failure to furnish the schedule, "the commission shall make out the schedule from the best information obtainable."

Sec. 3877. "The members of the railroad commission are constituted State railroad assessors, and they shall, upon the receipt or making and completion of the schedule provided

for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to taxation, affixing its true value so that such property shall bear its proportion of taxation," etc.

By sec. 3878, if the railroad assessors have reason to believe that the schedule as furnished is false or fraudulent, they shall not be bound thereby, but shall make proper assessment, giving notice to the railroad company to show cause, "such notice shall be served and returned as a summons from a court."

By sec. 3879 full records of the proceedings are required to be kept of all things done by the State railroad assessors.

By sec. 3880 the assessment as made shall remain on file subject to objections; and by sec. 3881 the State Railroad Assessors shall hear and consider objections to said assessment, and "they shall remain in session until all objections are heard and disposed of, and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly."

By sec. 3882 the assessment is to be affirmed after all objections are disposed of.

Sec. 3744, chap. 116, Code 1892, of which the foregoing sections are parts, provides: "The following property, and no other, shall be exempt from taxation:" specifying, but not including, railroads.

Chap. 108, Code 1892, on "Privilege Taxes," by sec. 3317, provides: "A tax on privilege is levied as follows: * * * 3379, Railroads: Railroads are divided into four classes—first, second, third, and narrow gauge—and privilege taxes are levied on them as follows: On each railroad of the first class, per mile, $20; on the second class, $15; on the third class, $10; on a narrow gauge class, $2. The Railroad Commission shall annually, on or before the first Monday of August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Code 1892, sec. 3: " * * * All acts or parts of acts, the subjects whereof are revised, consolidated and re-enacted by this Annotated Code, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed," etc. And sec. 8 provides that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be expressly so provided herein."

By these provisions of the Code of 1892 the Supreme Court held, in said No. 244, that the exemptions, if existent, were repealed.

There is no pretense that the Code of 1892, under which these taxes were levied, has ever been construed to uphold the exemption. These masterly opinions of the Supreme Court in said No. 244 are referred to as a clear and conclusive presentation of the law upon this point, and they demonstrate that there is no contract of exemption, as averred, and if there was that it was repealed.

Therefore, when the court by the interlocutory decree "finds that the complainant has shown no right to invoke the jurisdiction of this court," R. 51, it must have predicated this finding upon the want of equity on the face of the bill, and that even conceding the existence of jurisdiction, complainant was not entitled to the relief prayed. Hence, the decision of the court below did not turn upon the question of jurisdiction of the court as a Federal court, and, as shown, that is the sole question involved in this certificate.

Did the subsequent laws in the Code of 1892, and the act of 1894 creating State Revenue Agent, under which the State Revenue Agent was threatening to proceed by suit, impair the obligation of said 21st section, if valid, as averred by paragraph XX of the bill?

Under appellant's interpretation of said 21st section, it was necessary to assess the property for taxation, in order that the amount thereof may be ascertained to be paid by the payment of the same amount of construction debts, affidavit thereof, etc.

To make this assessment a judicial tribunal must be created by which, upon notice to the party, the proper value of the property may be ascertained. This was done by secs. 3875 *et seq.*, Code 1892, under sec. 112, Const. 1890.

No objection is pointed out in the bill to the constitutional character of this tribunal, nor to the want of notice. The Supreme Court of the State held this to be a constitutional tribunal having jurisdiction of the subject matter and of the railroad companies.

Y. & M. V. R. R. Co. v. *Adams*, 73 Miss., *supra*;
Supreme Court decided March, 1899, *supra*.

This court will follow and adopt this constuction.
Forsyth v. *Hammond*, 166 U. S. 516–17.

Therefore, the *subsequent* laws of the Code 1892, so far as the assessment is concerned, are not violative of the Federal Constitution.

The act of 1894, p. 29, creating State Revenue Agent and defining his powers confers no right upon the State Revenue Agent to seize or sell any property; his sole power is to bring suit in a court of competent jurisdiction to recover the taxes on the assessments so made. The bill does not aver wherein the said act of 1894 violates the Federal Constitution. The right to sue to enforce a claim for taxes could not violate the Federal Constitution. Said act of 1894 creates an officer with the power and duty "to proceed by suit in the proper court against all officers, county contractors, persons, corporations, companies and associations of persons, for all past due and unpaid taxes of any kind whatever * * He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue." Sec. 2, act of 1894.

The right of action would have existed in the State and the several counties and municipalities, severally, to have brought suit for the cause of action based upon an assessment for taxes, and a statute vesting these several rights of action in one

officer, so that one suit might determine the whole controversy, could not violate the Federal Constitution.

II.

Eleventh Amendment to Constitution Does Not Confer Jurisdiction.

There could be no right to invoke the jurisdiction of the Federal Court upon the ground that the suit against the State Revenue Agent was a suit against the State, and, therefore, forbidden by the 11th Amendment to the Constitution of the United States, because the bill does not and could not predicate relief on any such ground. That question is raised in defense by the motion to discharge the restraining order. Therefore, as the bill does not show this 11th amendment to be relied on in support of complainant's case, that question is not available to complainant to maintain the jurisdiction.

Walker v. *Collins*, 167 U. S. 59.

Third St. & Sub. Ry. Co. v. *Lewis*, 173 U. S. 457.

III.

Res Adjudicata.

The judgment of the circuit court of Hinds county, rendered at the June term, 1899, for the identical taxes sought to be enjoined in this proceeding, in a suit instituted by the Revenue Agent against appellant after the dismissal of the appeal by the Circuit Court of Appeals, and before this appeal, is *res adjudicata* of the matters of this appeal.

1. An appeal from a decree dissolving an injunction does not affect the validity of the decree appealed from.

Slaughter House Cases, 10 Wal. 273.

Hovey v. *McDonald*, 109 U. S. 150.

2. Suit in the State Court having been brought after the discharge of the restraining order, and before this appeal was taken, and judgment having been rendered therein in the State

court for the taxes sought to be enjoined, that judgment is a bar to the further prosecution of this appeal.

Stout v. *Lye*, 103 U. S. 68.
Case v. *Beauregard*, 101 U. S. 688.
1 *Van-Vleet Res. Adj.*, p. 88 and cases.
Mills v. *Green*, 159 U. S. 651, 654–5–6–7–8.

For these reasons, and those set forth in the brief of Mr. R. C. Beckett, this appeal should be dismissed; or, if there should be found color for the appeal, the decree should be affirmed.

S. S. Calhoon
Marcellus Green

S. S. CALHOON,
MARCELLUS GREEN,
Of Counsel for Appellees.

19.

Supp. Affidavit

FILED
SEP 14 1900
JAMES H. McKENNEY,
Clerk.

Filed Sept. 14, 1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

vs.

WIRT ADAMS, State Revenue Agent, &c., Appellee.

SUPPLEMENTAL AFFIDAVIT OF WIRT ADAMS IN SUPPORT OF MOTION TO DISMISS.

Monroe McLaurin Counsel,
W. A. Gwin,
H. C. Minor,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

To Messrs. WILLIAM D. GUTHRIE, EDWARD MAYES, and NOEL GALE, *Attorneys of Record for Appellant in the Above-entitled Cause, which was No.* 320 *of the October Term,* 1899:

You are hereby notified that the appellee in said cause, Wirt Adams, will, on the hearing of said cause, submit for the consideration of the court, as additional and supplemental ground of the motion to dismiss, the additional and supplemental affidavit of Wirt Adams hereto attached.

MARCELLUS GREEN,
F. A. CRITZ,
R. C. BECKETT,
Attorneys for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent, et al., Appellees.* } No. 79.

Appeal from the circuit court of the United States for the southern district of Mississippi.

Before me, L. B. Moseley, clerk of the circuit court of the United States for the southern district of Mississippi, this day personally appeared the within-named Wirt Adams, State revenue agent and appellee in the above-styled suit, and well known to me as such, and, being by me duly sworn, deposes and on oath says that he is such revenue agent and appellee, and he further testifies that since his former affidavit in the said cause, No. 320 of the October term, 1899, was made on September 5, 1899, and filed in this cause on September 9, 1899, the said two causes described as numbers 3266 and 3267 in said affidavit were taken by appeal to the supreme court of the State of Mississippi, and that such further proceedings were had therein that each of said judgments of said State circuit court for the first district of Hinds county were by said supreme court of Mississippi, on the 7th day of May, 1900, duly affirmed; that the numbers of said causes in said supreme court of Mississippi were 9461 and 9462, and that a writ of error was granted and sued out from the Supreme Court of the United States to said supreme court of Mississippi in each of said causes in June, 1900, and that each of said causes is now pending in said Supreme Court of the United States on said writs of error as numbers 355 and 356 of the October term, 1900, thereof, and affiant states and insists on the foregoing facts as additional and supplemental ground for the motion to

dismiss said cause No. 320 of the October term, 1899, No. 79 of the October term, 1900.

WIRT ADAMS,
State Revenue Agent and Appellee.

Sworn to and subscribed before me this the 29th day of August, 1900.

[SEAL.] L. B. MOSELEY,
Clerk of the Circuit Court of the United States for the Southern District of Mississippi.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent, et al., Appellees.* } No. 79.

Appeal from the circuit court of the United States for the southern district of Mississippi.

Before me, L. B. Moseley, clerk of said circuit court of the United States for the southern district of Mississippi, at my office, in Jackson, in said district, this day personally appeared the above-named appellee, Wirt Adams, well known to me as such, and, being by me duly sworn, deposes and says on oath that on this day he delivered in person to Mr. Edward Mayes, one of said attorneys for said appellant, The Yazoo and Mississippi Valley Railroad Company, in person, three true copies of the attached notice and additional and supplemental affidavit of the said affiant, Wirt Adams.

WIRT ADAMS,
State Revenue Agent and Appellee.

Sworn to and subscribed before me this 10th day of September, 1900.

[SEAL.] L. B. MOSELEY,
Clerk of said Court.

FILED
OCT 15 1900
JAMES H. McKENNEY,
Clerk

No. 79.
Sup. Ct. of Critz & Beckett
for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 15, 1900.

No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

SUPPLEMENTAL BRIEF OF APPELLEES ON MOTION TO DISMISS AND ON THE MERITS.

F. A. CRITZ,
R. C. BECKETT,
Attorneys for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-15-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 79.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

SUPPLEMENTAL BRIEF OF APPELLEES ON MOTION TO DISMISS AND ON THE MERITS.

In further reply to the contention of opposite counsel that the suits in the State court for the taxes involved in this case were pending in the supreme court of Mississippi on appeals, with supersedeas, and for that reason could not affect this case in this court, we call attention to the supplemental affidavit of Wirt Adams, appellee, of August 29, A. D. 1900, filed herein September 22, 1900, which shows

that both of said cases in the Mississippi supreme court have been affirmed and the judgments of the circuit court therein in favor of the revenue agent made final.

And in answer to the claim of *bona fide* issuance and sale of bonds, we refer, besides the authorities in our joint reply brief on page 23, to the late case of Weyerhauser *vs.* Minnesota, 176 U. S., 550, 559.

F. A. CRITZ,
R. C. BECKETT,
Attorneys for Appellees.

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118 f 741
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ILLINOIS CENTRAL RAILROAD COMPANY *v.* ADAMS.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* ADAMS.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY *v.* ADAMS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Nos. 77, 78, 79. Argued October 24, 1900. — Decided January 7, 1901

An appeal to this court from a Circuit Court will not be dismissed upon the ground that, after an injunction against the collection of certain taxes was refused by the Circuit Court, and while the suit was still pending in that court, defendant brought suit in the state court and recovered the taxes in question. The defence of *res adjudicata* cannot be made available upon motion to dismiss an appeal.

Jurisdiction is the right to put the wheels of justice in motion, and to proceed to the final determination of the cause upon the pleadings and evidence. It exists in the Circuit Courts, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2000, and if the defendant be properly served with process within the district.

A failure to allege a compliance with the Ninety-fourth rule in equity concerning bills brought by stockholders of corporations against the corporation and other parties, does not raise a question of jurisdiction but of the authority of the plaintiff to maintain his bill.

As the bill set up a contract with the State in a railway charter, and also averred that such contract had been impaired by subsequent legislation, it was *held* that the bill presented a case under the Constitution of the United States, and that jurisdiction might be sustained upon that ground alone.

The question whether a suit, nominally against an individual by name, is in reality a suit against the State within the Eleventh Amendment to the

Statement of the Case.

Constitution, is a defence to the merits rather than to the jurisdiction of the court.

Such defence should be raised either by demurrer or other appropriate pleadings, and cannot be made available upon motion to dismiss.

Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case.

As the suit was against a revenue agent appointed by the State who represented all the parties interested, to enjoin the collection of a gross sum far exceeding the jurisdictional amount, the fact that such sum when collected would ultimately be distributed in small amounts to the various municipalities interested, does not defeat the jurisdiction of the court.

No. 77 was a bill in equity filed by the railroad company, an Illinois corporation, against Wirt Adams, revenue agent, a citizen of the State of Mississippi, the railroad commission of that State, and the Canton, Aberdeen and Nashville Railroad Company, a corporation of the State of Mississippi, to enjoin the railroad commission from approving and certifying an assessment for taxes on the Canton, Aberdeen and Nashville Railroad for any of the years from 1886 to 1897 inclusive; also to enjoin the revenue agent from beginning any suit, or advising any of the counties or towns along the line of such road to bring suit for the recovery of such taxes, and for a decree adjudging such railroad to be exempt from state and county taxation for the years aforesaid.

A temporary injunction, issued upon the filing of the bill, was subsequently discharged, an appeal taken to the Court of Appeals, which was dismissed for the want of jurisdiction, and a final decree subsequently entered in the Circuit Court dismissing the bill with the following certificate upon the questions of jurisdiction:

"1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship. Defendants claim that its interest was derivative through the Canton, Aberdeen and Nashville, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Canton, Aberdeen and Nashville Railroad Company a party defendant in the cause.

"2. That the complainant by its original bill showed no juris-

diction in this court because of the subject-matter stated, inasmuch as the bill set forth no particular Federal question.

"3. That there was no jurisdiction in this matter, because the bill was a suit against the State of Mississippi and in violation of the Eleventh Amendment to the Constitution of the United States."

Mr. William D. Guthrie for appellant.

Mr. F. A. Critz and *Mr. Marcellus Green* for appellees. *Mr. R. C. Beckett*, *Mr. S. Calhoun* and *Mr. Garner Wynn Green*, were on their brief.

Mr. Justice Brown, after stating the case as above, delivered the opinion of the court.

1. Motion was made to dismiss this bill upon the ground that the purpose and object of the original injunction bill have failed by reason of the fact that, (as appears from an affidavit filed by Adams in this court since the case was docketed here,) after the injunction was refused, and before the bill was finally dismissed or an appeal taken to this court, he filed a bill in equity in the chancery court of Clay County, Mississippi, against the Illinois Central Railroad Company and the Canton, Aberdeen and Nashville Company to collect the same taxes involved here, and in addition thereto the taxes for the year 1898; that the defendants in their answer set up the same defences relied upon here, which were overruled by the chancery court, and a final judgment given against the property as a paramount lien, June 16, 1899, from which decree an appeal is now pending and undetermined in the Supreme Court of the State.

The argument is that, inasmuch as the injunction in this suit was vacated by the Circuit Court, the assessment of taxes completed, and suit brought upon it and judgment recovered, the appeal in this case is abortive and improper for the reason that the very things the bill was filed to prevent are accomplished facts, and the railway companies cannot be injured, inasmuch as they have a complete remedy by writ of error to the Supreme

Court of the State from this court, if any Federal question be involved and decided against them by that court.

The question which arises upon this state of facts is, first, whether a decree in an equity cause in a state court can be set up as *res adjudicata* pending an appeal from such decree to the Supreme Court of the State; and, second, whether, assuming the decree to be still in force pending the appeal, it can be pleaded as *res adjudicata* upon motion to dismiss the appeal in this court. We are of opinion that this is a defence to the merits of the case, and is no ground for the dismissal of the appeal. It would hardly be contended that, if this decree of the state court had been pronounced before the bill was filed in the Federal court, the appeal would be dismissed upon motion upon that ground; much less that it could be set up as ground for dismissing an appeal to this court. The case is not different, if the decree, instead of being rendered before the bill is filed in the Federal court, is rendered after such a bill is filed, and pending suit. In either case it is a question whether it operates as an estoppel. While the fact that an appeal has been taken from such decree, which is still pending, introduces a new element, it is still the same question whether the decree can be made available as an estoppel upon motion to dismiss.

It is true that since the injunction against him was dissolved, Adams has sued and has succeeded, but it does not follow that his judgment may not be reversed by the Supreme Court when plaintiff's right to prosecute this bill would be revived.

We think the question is practically covered by the decision of this court at the last term in the case of *Huntington* v. *Laidley*, 176 U. S. 668. In that case Huntington, as a receiver of the Central Land Company, on February 28, 1891, filed a bill in the Circuit Court of the United States against Laidley and other defendants, to set aside certain deeds which were claimed to be in fraud of the rights of the land company and a cloud upon its title. Defendants answered and set up by way of estoppel certain judgments in the state courts rendered before the bill was filed, in favor of Laidley and against the Central Land Company in an action of ejectment, and also in a suit in equity between them. The Circuit Court upon this state of

facts certified to this court whether that court was without jurisdiction, because of the pendency in the state court, prior to the suit, of the action of ejectment begun by Laidley against the Central Land Company, and also of the suit in chancery brought in the state court prior to the commencement of the case. It was held by this court that the question "whether the proceedings in any or all of the suits, at law or equity, in the state courts, afforded a defence, either by way of *res adjudicata*, or because of any control acquired by the state court over the subject-matter to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction." "The Circuit Court of the United States," said Mr. Justice Gray, "cannot, by treating a question of merits as a question of jurisdiction, enable this court (upon a direct appeal on the question of jurisdiction only) to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case." So, too, in *Reilly* v. *Bader*, 50 Minnesota, 199, it was held that a former adjudication could not be set up by motion after trial and verdict. All that was held in *Marsh* v. *Shepard*, 120 U. S. 595, was that one of several appellants cannot dismiss an appeal to this court, if the other appellants oppose such dismissal, though after the appeal was taken the Supreme Court of the State had enjoined all the appellants from enforcing their claims. Motion was denied upon the grounds that one appellant cannot control the appeal as against his co-appellants. In *Mills* v. *Green*, 159 U. S. 651, it was only held that where, after appeal taken, an event occurs which would render it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal—in other words, that the court will not decide moot cases. In the case under consideration, however, the question still remains whether a decree of a state court can be made available as an estoppel pending an appeal to the Supreme Court, and this, as already stated, is a defence upon the merits.

As the Circuit Court certifies to this court, pursuant to section 5 of the Courts of Appeal Act, that the bill was dismissed for the want of jurisdiction, and this fact further appears on the face of the decree discharging the restraining order and overruling the motion for an injunction, the motion to dismiss must be denied.

Coming now to the three questions certified upon the subject of jurisdiction by the Circuit Court, we are next to inquire whether such jurisdiction can be supported upon the ground (1) of diversity of citizenship; (2) of a question arising under the Constitution or laws of the United States; or (3) whether it is ousted by the fact that the suit is against the State of Mississippi in violation of the Eleventh Amendment to the Constitution.

2. Plaintiff is averred to be a citizen of Illinois, and all the defendants citizens of Mississippi; but it further appears that the Illinois Central Company claims the right to bring the bill upon the ground that it is the lessee of the property and a creditor and a mortgage bondholder of the Canton, Aberdeen and Nashville Railroad Company, whose property is sought to be taxed. It seems that it was once the owner of all the bonds, amounting to $2,000,000, but for some reason a subsequent mortgage was executed, and under it bonds to the amount of $1,750,000 were issued and sold, and a like number of the first two million issue were surrendered, and a note, secured by a second mortgage, taken for the balance. The latter bonds and note are averred to have been paid for at par in good faith, and to be secured by a paramount lien, and in reliance upon the charter as valid, and upon the mortgaged premises as being free from taxation for twenty years. It is not averred in the bill that the Canton Company has ever refused to sue, or has in any way been requested to sue, by the appellant, or by any one else. The gravamen of the bill is that the Canton Company was chartered by the legislature of the State by act of February 17, 1882, and that by such charter it "was exempt from taxation for a term of twenty years from the date of approval of this act."

It is here insisted, and such seems to have been the opinion of

the court below, that the appeal cannot be sustained under the Ninety-fourth equity rule, which provides that every bill brought by stockholders of corporations against the corporation and other parties, founded on rights which may properly be asserted by the corporation, "must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer upon a court of the United States jurisdiction of a case, of which it would not otherwise have cognizance;" and must "also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action." Assuming, under the affidavit of Adams, though made only upon information and belief, that the plaintiff, the Illinois Central, owns a majority of the stock of the Canton Company, we are still of the opinion that the defence set up under the Ninety-fourth rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill. Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the Circuit Courts of the United States under the express terms of the act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2000, and the defendant be properly served with process within the district. Excepting certain *quasi*-jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of the controversy in the Circuit Courts. It may undoubtedly be shown in defence that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the

cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the case of *Smith* v. *McKay*, 161 U. S. 355, and *Blythe* v. *Hinckley*, 173 U. S. 501, that it was not a question of the jurisdiction of the Circuit Court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the Ninety-fourth rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case.

3. But we are also of opinion that the bill presents a case under the Constitution of the United States, and that jurisdiction may be sustained upon that ground alone. The bill set forth the provisions of the constitution of 1869, and the interpretation put upon it in the case of *Mississippi Mills* v. *Cook*, 56 Mississippi, 40, rendered in 1878, wherein that court construed these provisions, and declared that they did not require the legislature to tax the property of corporations for pecuniary profits; that this ruling had been repeatedly affirmed and had become the settled rule of property in the State, adopted and acted upon by the legislative, judicial and executive departments. The bill further alleged a continued course of legislative exemption of railway properties from taxation; that the railroad commission had never before denied the validity of the exemption of the Canton Company, nor attempted to assess that company for taxation; that the constitution of 1890 expressly provided that exemptions from taxation to which corporations were legally entitled at the adoption of this constitution should remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the gene-

ral laws, unless sooner repealed by the legislature, and that successive legislatures had since the adoption of that constitution refused to repeal exemptions contained in charters theretofore granted; that the plaintiff, upon the faith of this interpretation of the constitution of 1869, and of a provision in the charter of the Canton Company exempting it from taxation for twenty years, advanced over $2,500,000 to build and equip the road; that the same was built with the money so furnished; that a lease of such road was executed to plaintiff, and that it had since been and is now in possession of the property; that the charter, with its exemption, the right to lease and the lease itself, were contracts rightfully made in view of the settled law as declared, and were valid under the constitution of Mississippi as previously expounded, and that the obligations of these contracts were binding as against any subsequent change of judicial decision. The bill further averred that the defendants, "claiming to act under laws of said State, passed subsequently to said charter and its acceptance, are endeavoring to and will, illegally, impair and destroy the obligations of said charter contract, as aforesaid, unless restrained by your honors, . . . and that they are also attempting and claim that they have succeeded in fastening upon said railroad a first and paramount lien under acts of said State, passed in 1892 and 1894, and acts done by them in 1898 which displaces and is paramount to the lien to secure said mortgage bonds." It also denied the constitutional power of subsequent legislatures to compel the payment of taxes retroactively, while not denying its power to repeal the exemption in the charter as to future taxes, and, generally, that the contract had been impaired by the acts of the legislature ordering the assessment of the property for taxation.

The bill clearly avers a case arising under the Constitution of the United States, and is one of which the Circuit Court would have jurisdiction irrespective of the citizenship of the the parties. As we had occasion to observe in *City Railway Company* v. *Citizens' Street Railroad Company*, 166 U. S. 557, 564, "whether the State had or had not impaired the obligation of this contract was not a question which could properly

be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one." See also *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79, 88.

4. The question whether this is a suit against the State within the Eleventh Amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to suits against one of the United States by citizens of another State, is also one which we think belongs to the merits rather than to the jurisdiction. If it were a suit directly against the State by name, it would be so palpably in violation of that amendment that the court would probably be justified in dismissing it upon motion; but the suit is not against the State but against Adams individually, and if the requisite diversity of citizenship exist, or if the case arise under the Constitution or laws of the United States, the question whether he is so identified with the State that he is exempt from prosecution, on account of the matters set up in the particular bill, are more properly the subject of demurrer or plea than of a motion to dismiss. This seems to have been the opinion of Chief Justice Marshall in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 858, wherein he makes the following observation: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

It may be said in a certain sense that the judicial power does not extend to civil suits (at least if begun by *capias*) against members of Congress or of the state legislatures, pending the session; or against witnesses going to, attending or returning from courts of justice; or against bankrupts for causes for action arising before bankruptcy and covered by the discharge; or against infants upon their general contracts; or against the owners of vessels who have petitioned for a limitation of liability; but it was never doubted that such power extended to an

examination of the question whether the defendant was entitled to the exemption of liability claimed by him, and in passing upon this question the court necessarily assumed jurisdiction of the cause. In the great case of *Chisholm* v. *Georgia*, 2 Dallas, 419, it was never intimated, either by court or counsel, that the question of the suability of the State was not within the jurisdiction of the court to decide, the whole argument being addressed to the question of non-liability to a citizen of another State. In that case the process was served upon the Governor of the State, but as he did not appear, counsel for the plaintiff made a motion that unless the State caused its appearance to be entered judgment should be rendered by default. This seemed to be the only method by which the court could be called upon to pass upon the suability of the State, and was in reality a motion for judgment. See also *Hans* v. *Louisiana*, 134 U. S. 1.

But where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. As already observed, this question depends upon the language of the statute, although the word "jurisdiction" is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case. To put a familiar test: can it be possible that if the plaintiff company were to succeed in this suit, the decree in its favor could be attacked collaterally as null and void for want of jurisdiction, by reason of the fact that the bill failed to allege a compliance with the Ninety-fourth rule in equity, or because the defendant was really a representative of the State, and the suit was in fact a suit against the State?

But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case. *Howard* v. *Waldo*, 1 Root, 538; *Conger* v. *Dean*, 3 Iowa, 463;

Lyon v. *Smith*, 66 Mich. 676; *Bloss* v. *Tacke*, 59 Missouri, 174; *Chapman* v. *Blakeman*, 31 Kansas, 684; *Hill* v. *Hermans*, 59 N. Y. 396; *Oregon & Transcontinental Co.* v. *Northern Pacific Railroad*, 32 Fed. Rep. 428; *The Othello*, 1 Ben. 43; *Cushing* v. *Laird*, 4 Ben. 70.

In *Fitts* v. *McGhee*, 172 U. S. 516, where a suit was brought against state officers to enjoin them from proceeding under an alleged unconstitutional law, the question whether they were representatives of the State was disposed of upon answers filed by officers of the State.

5. The question whether the amount in controversy be sufficient to sustain this bill is not one of those certified by the Circuit Court, nor upon which that court expressed an opinion; but, assuming it to be properly before us, we think that jurisdiction cannot be defeated upon that ground. The allegation of the bill is that the taxes assessed amount to a "large sum, much more than twenty thousand dollars, to wit, the sum of ——dollars." The suit is against the revenue agent, who represents all the parties interested, to enjoin the collection of a gross sum far exceeding the jurisdictional amount. How that sum, if collected, would ultimately be disposed of, and to which and in what proportions and amounts it would be parcelled out to the several municipalities interested, is one which does not arise upon the face of the bill, and is unnecessary to be considered here. In *Walter* v. *North Eastern Railroad Co.*, 147 U. S. 370, the bill was filed by the railroad company against the officers of four counties through which the road passed to enjoin the collection of certain taxes. The amount applicable to each county was stated in the bill, and it appeared that in each case it was much less than $2000. It was held that had these taxes been paid under protest and the plaintiff sought to recover them back, it would have been obliged to bring separate actions in each county, as the amount recoverable from each county would be different, and no joint judgment could possibly be rendered. So, if the injunction had been sought in a state court, the defendants could not have been joined in one bill, but a separate bill would have had to be filed in each county. This was also the case in *Fishback* v. *Western Union Telegraph Co.*, 161 U. S.

96. These cases are quite distinguishable from those which hold that an action may be maintained for a lump sum, though such sum when collected may be subsequently distributed among various parties, each receiving less than the jurisdictional amount. *Shields* v. *Thomas*, 17 How. 3, 4; *Rodd* v. *Heartt*, 17 Wall. 354; *The Connemara*, 103 U. S. 754; *New Orleans Pacific Railway Co.* v. *Parker*, 143 U. S. 42.

In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the Circuit Court to entertain this bill, and its authority to pass upon the several defences set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits.

No. 78, another case between the same parties, arises upon a similar record. This was also a bill by the Illinois Central Company against the revenue agent and railroad commission of the State, and against the Yazoo and Mississippi Valley Railway Company, to enjoin the assessment of taxes on railroad property formerly belonging to the Natchez, Jackson and Columbus Railroad Company for the years 1886 to 1891 inclusive. The plaintiff sued as owner of all but four shares of the capital stock of the Yazoo Company, which company in turn owned a large part of the capital stock of the Louisville, New Orleans and Texas Company, of which plaintiff was a large bondholder. The Louisville Company had acquired by purchase the property and franchises of the Natchez, Jackson and Columbus Company, which was sought to be taxed by the assessment enjoined. The bill further set forth the consolidation of the Louisville Company with the Yazoo Company upon which the first of these cases turned, and claimed all the immunities belonging to the

constituent companies. The same questions are presented by the record and the same result must follow.

Still another case (No. 79) is brought by the Yazoo and Mississippi Valley Railway Company, consolidated October 24, 1892, with the Louisville, New Orleans and Texas Company, whereby all the property and franchises formerly belonging to the Natchez, Jackson and Columbus Company were transferred to and became the property of the plaintiff, including which were the contract rights of the Natchez Company under section 21 of the Mobile and Northwestern charter. This suit was brought to enjoin the collection of taxes for the year 1898 upon the property originally belonging to the Natchez and Louisville Companies. As the plaintiff was a citizen of Mississippi no question of the diversity of citizenship arose, and jurisdiction was not claimed upon that ground. The questions are otherwise identical with those presented in the former cases, and a similar result must follow.

The decrees of the Circuit Court dismissing the bills in these cases for the want of jurisdiction must therefore be reversed, and the cases remanded to that court for further proceedings not inconsistent with this opinion.